

THE PRINCIPLES
OF
PLEADING AND PRACTICE
IN
CIVIL ACTIONS
IN THE
HIGH COURT OF JUSTICE.

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PREFACE

TO THE SEVENTH EDITION.



THE Sixth Edition of this book was published in September, 1906. Since its appearance, many important points have been decided which affect the procedure of our Courts. These have involved considerable modification in the present edition. All relevant decisions have been noted down to and including September 1st, 1911, and the whole book has been thoroughly revised and brought up to date.

I have to thank my friend, Mr. CLEMENT C. GATLEY of the Inner Temple, and my son, Mr. WALTER BLAKE ODGERS of the Middle Temple, for the efficient assistance which they have rendered me in the preparation of this edition and in passing it through the press.

W. B. O.

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PREFACE

TO THE FIRST EDITION



THE system of pleading introduced by the Judicature Acts is in theory the best and wisest, and indeed the only sensible, system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies, he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail, and thus the matters really in dispute are speedily ascertained and defined. Some such preliminary process is essential before the trial.

How is it, then, that it is the fashion to decry our modern pleadings, to treat them as waste-paper, and to deplore the loss of the ancient method with its counts and pleas known by fantastic names, half Latin and half Norman-French? There are many reasons why the new system has not yet met with the success which it deserves. It has hitherto been worked mainly by men educated under the former practice. The modern system has never been so thoroughly taught to the younger generation of pleaders. Moreover, the reform was not, in one or two instances, sufficiently thorough. Some antiquated fragments of the old procedure remain (such as the plea of Not Guilty by Statute) which destroy the symmetry of the modern rules. There is yet another reason why our present system of pleading does not work so well as it should. Each party in turn ought to admit clearly or to deny expressly each fact alleged by his opponent. But counsel cannot do this, unless he is fully instructed as to the actual facts. The solicitor

cannot fully instruct counsel as to the facts without thoroughly getting up the case, and the taxing master always discourages his doing so at this stage. The amount allowed for Instructions for Defence and Reply is wholly inadequate to recompense the solicitor for the time and labour involved in properly instructing counsel how to plead. Hence admissions which ought to be made are not made.

It is in the hope of removing one cause of this want of success that I have written this Book on the principles of our present system of pleading. I have embodied in it notes made from time to time for the use of my own pupils. The rules of law are stated in large type, explanations, historical matter, and practical hints are given in smaller type, but larger than that used for the Illustrations. These have often been drawn from the older reports. It is to the sixteenth and seventeenth centuries that we must turn for a clear exposition of the rules of pleading at common law; and it was only in those days that the rules of pleading were rigorously and inflexibly enforced. Now, our regard for "the merits" overrides our respect for nice questions of pleading, though such questions still largely affect costs. But while the old law is freely referred to, all relevant decisions since 1875 will be found cited under their appropriate headings.

I am indebted to my friend and former pupil, Mr M STEWART PRICHARD, of the Inner Temple, for the full and convenient Index which he has prepared, and also for his kindness in revising the proof sheets.

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in the *afternoon*, on the hearing of an application on the part of the *Plaintiff* to show cause why an Order for Directions should not be made in this action as follows—

Pleadings to be delivered*

Particulars [That the ——— deliver within ——— days particulars of ——— and that in default all further proceedings in this action be stayed until such particulars are delivered (or, that the Defendant be precluded from giving evidence in support thereof on the trial of the action), and that the ——— have ——— days to deliver his ——— after delivery of such particulars]

Admissions

Discovery That the *Defendant* file an affidavit of documents in ten days

Interrogatories For leave to interrogate the *Defendant*. Answers to be filed within ten days

Inspection of documents

Inspection of real or personal property

Commissions To *Gibraltar to examine witnesses*

Examination of witnesses

Place of trial *Middlesex*

Mode of trial *Special Jury*.

Any other interlocutory matter or thing

Dated the 10th day of *January*, 1911

This summons was taken out by G H, solicitor for the *Plaintiff*

To ———

No 44.

ORDER FOR DIRECTIONS UNDER ORDER XXX.

[Heading as in Precedent No. 40]

Upon hearing the solicitors on both sides, the following directions are hereby given, and it is Ordered—

That there be pleadings in the action Statement of Claim with particulars in fourteen days. Defence with particulars ten days thereafter

That the plaintiff and defendant do, respectively, within ten

* The words in italics would be in writing on the original summons.

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days after delivery of Defence [and receipts for deposits], answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action

Inspection of documents upon usual notice

That the action be tried in Middlesex

That the action be tried with a Special Jury at the plaintiff's instance

Dated the 16th day of January, 1911

No 45

SUMMONS FOR DIRECTIONS IN A COMMERCIAL CASE

[Heading as in Precedent No 40]

Let all parties concerned attend the Judge in Chambers, at the Central Office, Royal Courts of Justice, Strand, London, on Tuesday, the 28th day of March, 1911, at 10 30 of the clock in the forenoon, on the hearing of an application on the part of the plaintiff for an order for directions as follows —

That the action be transferred to the Commercial list

That points of claim be delivered by the plaintiff in *four* days.

That points of defence be delivered by the defendant in *four* days afterwards

That list of documents be exchanged between the parties in seven days and inspection be given within three days afterwards

That the action be tried *without* a jury

That the date of trial be fixed for *April 24th*, 1911

That the costs of this application be costs in the cause

Dated the 22nd day of March, 1911

This Summons was taken out by ——— of ———, solicitors for the plaintiff.

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PRINCIPLES OF PLEADING AND PRACTICE.

CHAPTER I AN ACTION AT LAW

The Writ

EVERY action in the High Court of Justice is commenced either by a writ or by an originating summons. A writ is a formal document by which the King commands the defendant to "enter an appearance"* within so many days, if he wishes to dispute the plaintiff's claim, otherwise judgment will be signed against him.† The writ must state the name and residence of each plaintiff and defendant, and the name and place of business of the plaintiff's solicitor, if he employs one. It must also specify the Division of the High Court in which the plaintiff intends to sue, and give "an address for service"—an address, that is, at which notices and all other written communications may be left for him. If he is suing, or if any one of the defendants is sued, in a representative capacity (*e.g.*, as trustee of the estate of some bankrupt, or as the executor or administrator of some one deceased), this also must be stated on the writ. If the plaintiff be a woman, the writ should state whether she is a "widow," or a "spinster," or the "wife of A. B."

* See *post*, p. 5.

† See Precedent, No. 1, in the Appendix.

Besides these formal statements, every writ, before it is issued, must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action. In some cases, indeed, the plaintiff is allowed to state the particulars of his case in full detail on the back of his writ, which is then said to be "*specially* indorsed." He may only do so in the six cases which are enumerated in Chapter III (p. 42). And even in those six cases he is not compelled to specially indorse his writ unless he wishes so to do, though as a rule he is only too glad to avail himself of the privilege, as it may lead to his obtaining judgment more speedily. More often the plaintiff merely indorses on his writ a *general* statement of the nature of his claim, or he may claim an *account*; or he may indorse his writ *for trial without pleadings*.* He must place on his writ one or other of these indorsements to show the nature of the action, otherwise the defendant would not know why he was sued. The indorsement should also state the relief which the plaintiff claims (See *post*, p. 203.)

Issuing the Writ.

As soon as the writ is prepared and its indorsement duly drafted, the next step is to "issue" it, that is, to make it an official document, emanating from the Court. There is no difficulty now about this. In former days, when every one was less busy, issuing a writ was regarded as a judicial, not a ministerial, act; the officer of the Court drafted, or at all events settled, the plaintiff's writ for him, and would not allow any writ to issue which, in his opinion, was not in proper form. This often caused an eager litigant trouble and delay, though it might save him costs in the end. But there is no longer any difficulty of this kind. The plaintiff now draws up any in-

* As to these four different kinds of indorsement, see *post*, Chapter III

dorsement he pleases, and the officers of the Court raise no question as to its sufficiency in law. They leave it to the defendant to take objection to it subsequently, if it is not as it should be.

There are, however, two cases in which leave to issue a writ is still necessary:—

- (i) Where the defendant is not in England. No writ that the plaintiff intends to have served on any person abroad will be issued, unless the plaintiff first obtains the leave of a judge; and such leave will only be granted in the cases specified in Order XI *
- (ii) Where the plaintiff seeks to join on his writ different causes of action which may not be joined without leave. See for instance Order XVIII. rr. 2, 3. Under these rules it is sufficient if, before issuing his writ, the plaintiff obtains leave to join such claims from a Master; and, even if he does not, the defendant will waive the irregularity, if he enters an appearance without taking the objection. (*Lloyd v Gt. W. Dairies Co.*, (1907) 2 K. B. 727.)

In every other case issuing a writ is a very simple process. There are in many of our larger provincial towns branch offices of the High Court of Justice, called District Registries; and a plaintiff (except in a probate action) may issue his writ either out of a District Registry or out of the Central Office in London at his option. The plaintiff or his solicitor takes two copies of the proposed writ to the Writ Department of the

* See *post*, p. 32. The procedure in the High Court is mainly regulated by "Rules of the Supreme Court" which are divided according to their subject-matter into 78 "Orders." They are made by the judges under powers conferred on them by the Judicature Acts, and have all the force and effect of a statute. Those Rules with which it is most necessary for a student to be familiar I have placed in an Appendix to this volume. The remainder he will find in a white book, called "The Annual Practice."

Central Office, or to a District Registry, signs one copy, and pays ten shillings. The officer impresses a ten shilling stamp on the signed copy, and files it; he stamps the other with what is called a "seal," and hands it back, this then becomes "the writ in the action" It is marked with a letter and a number (thus, "1911, B, No 356"), the letter being the initial of the first plaintiff's surname and if issued in the Chancery Division, it is also marked with the name of one of the six judges of that Division, to whom the action is thenceforth assigned

Service of the Writ.

The plaintiff must next "serve" the writ on the defendant. The proper way to serve a writ is to show the defendant himself the original, and then to deliver to him and leave with him a correct copy of it. The person, who serves the writ, must within three days indorse on it the day of the month and week of the service; otherwise the plaintiff cannot, in case of non-appearance, proceed by default (Order IX r 15) This is called "personal service" But the defendant's solicitor generally undertakes to accept service and enter an appearance for him. Where it is impossible to effect prompt personal service, *e g*, where the defendant has gone abroad, the plaintiff may apply for an order for "substituted service," *i.e.*, by serving the defendant's partner, solicitor, steward, or agent, or by giving him notice of the writ by registered letter or by advertisement in the newspapers (Order X.) To obtain such order he must show that he has made efforts to effect personal service, and that such efforts were unsuccessful. If the ~~action~~ be for the recovery of land, and no one is in possession of that land, the writ is served by posting a copy of it upon the door of the dwelling-house or other conspicuous part of the property. (Order IX r. 9)

Entering an Appearance.

A defendant who has been served with a writ must make up his mind speedily whether he means to defend the action or not. If he decides to defend the action, he must "enter an appearance" In early days the defendant had physically to appear before some Court, and submit to or protest against its jurisdiction, and state publicly that he intended to defend the action and on what grounds But now "entering an appearance" has become as formal a proceeding as issuing a writ. The defendant or the clerk of his solicitor hands to the proper officer at the Central Office or District Registry two copies of a memorandum in writing, and pays two shillings for each defendant appearing; one copy the officer "seals" with his official stamp, and returns to the person entering the appearance, the other he retains and copies into a book called the "Cause Book" In the memorandum the defendant must state the name and address of his solicitor, if he has one, or, if not, his own, and must give an address for service, at which letters and notices may be left for him (See Precedent, No. 2.) If any defendant neither resides nor carries on business within the district he may appear either in the District Registry or at the Central Office. (Order XII. r 5) By so appearing, the defendant submits to the jurisdiction of the Court (unless he appears "under protest") He must on the same day give notice to the plaintiff or his solicitor that he has appeared, and send him the copy of the memorandum which the officer sealed, as a certificate that he really has appeared on the day indicated by the seal.

Default of Appearance.

If the defendant does not enter an appearance within the period named on the writ (which is usually eight days after the service of the writ on him, inclusive of the day of such

service) the plaintiff is, as a rule, entitled to judgment in default of appearance. But if the plaintiff omits or delays to enter judgment, the defendant may still enter an appearance, although the period prescribed has elapsed (Order XII r 22). Where the writ is (or might have been) specially indorsed, and the defendant does not appear, the plaintiff may enter *final* judgment for the full amount claimed on the writ, and costs. If the action be for the recovery of land, the plaintiff is entitled to a judgment that he shall recover possession of the land. If the action be for damages or the return of a chattel, the plaintiff is not entitled to final judgment, he can only have what is called an *interlocutory* judgment—a judgment, that is, in his favour, but with no amount stated. The amount of damages or the value of the chattel must be subsequently assessed by a jury or by an Official Referee*. The Master may order a Statement of Claim or particulars to be filed before the assessment. The defendant, although he has not appeared, may attend and argue and call evidence at the assessment. And then the plaintiff may enter final judgment for the amount so assessed (See Order XIII rr 1—11).

But where the action is of such a kind that originally it could only have been brought in the Court of Chancery (*e g*, a claim for an injunction to restrain a nuisance or a breach of covenant) the procedure is different. The plaintiff is not at this stage allowed to enter any judgment, either final or interlocutory, although the defendant has not appeared. The plaintiff must at first proceed as if the defendant had appeared. He must prepare a Statement of Claim. No order from a Master is necessary (See *post*, p. 78). But he does not deliver it to the defendant, he files it in the offices of the Court. (Order XIII r. 12). The defendant may still appear.

* An Official Referee is an officer of the Court, who decides questions of accounts, and tries actions which are unsuited for trial by judge alone, or by judge and jury. (See *post*, p. 41.)

If he decides to do so, he may go to the Filing Department and find out what steps have been taken in the action, and the action proceeds as though he had appeared in proper time. But if he does not appear, he cannot deliver a Defence, and the plaintiff, after waiting ten days, can move the Court for judgment in default of Defence. The Statement of Claim will stand admitted, and the plaintiff will obtain such judgment as he is entitled to on the assumption that every word contained in his pleading is true. (Order XXVII r 11)

Summons for Directions

If the defendant appears to the writ, the next step generally is for the plaintiff to take out a summons, as it is called, before a Master of the Supreme Court. A Master is an officer of the Court who has power to decide, in the first instance, subject to an appeal to a judge, all, or nearly all, the preliminary questions which arise in an action prior to the trial. A District Registrar has the same powers as a Master, and does the same work in any large provincial town that has a District Registry.* A summons is an official document which bids the defendant to attend before a Master in Chambers, on a day and at an hour named, and hear the plaintiff's application, and either oppose or consent to it. It must be served on the defendant at least two (sometimes four) clear days before the day named for the hearing of the application.

If the writ is generally indorsed, the plaintiff *must*, in every action except an Admiralty action, take out a summons for directions under Order XXX—that is, a summons asking the Master to give directions as to the future conduct of the proceedings. (See Chapter VI. and Precedent, No 43.) If, however, the writ is specially indorsed, he can apply to the

* And please understand that henceforth throughout this book the word "Master" always includes a "District Registrar."

Master for summary judgment under Order XIV. (See Chapter IV and Precedent, No 41) He can only obtain summary judgment when his writ is specially indorsed under Order III r 6, and he is not bound to apply for it in every case where it is so indorsed. He can, if he wishes, take out a summons for directions under Order XXX as though his writ were generally indorsed Or he can take out no summons at all, in which case the defendant must plead to the special indorsement, and then the plaintiff can give notice of trial *

If he applies for summary judgment, and fails to obtain it, the Master will proceed to give all necessary directions, just as though the summons had been taken out under Order XXX On either summons, the Master has power to decide whether there shall, or shall not, be any pleadings or any further pleading delivered, whether there shall be discovery and inspection of documents, whether any interrogatories shall be administered, where the action shall be tried, and whether by a judge alone or by a judge with a special or a common jury, and practically all other questions which arise in the action before final judgment is entered, save only those that arise at the actual trial.

Pleadings

Pleadings are statements in writing delivered by each party alternately to his opponent, stating what his contention will be at the trial, and giving all such details as his opponent needs to know in order to prepare his case in answer. In many actions, however, there are no pleadings at all (see *post*, p 79), and as a rule there are now not more than two pleadings in any action

(a) A Statement of Claim, in which the plaintiff sets out

* For the special procedure where the writ is indorsed for an account or for trial without pleadings, see *post*, pp 40. 61.

his cause of action with all necessary particulars as to his injuries and losses, and

- (b) A Defence, in which the defendant deals with every material fact alleged by the plaintiff in his Statement of Claim, and also states any new facts which tell in his own favour

Sometimes the defendant sets up a Counterclaim, which is in the nature of a cross-action, and to this the plaintiff must deliver a special Reply stating his answer to the Counterclaim. The nature and object of the various pleadings is explained in Chapters XII., XIII, XIV, and XV.

Discovery.

In some cases, but by no means now in all, the Master will order one party (or both parties) to make a list of all documents which are in his possession, and which are material to any question in issue in the action; and to permit his opponent to inspect and take copies of these documents before the trial. This disclosure is technically known as "discovery of documents", it often tends to save expense and shorten litigation. What is more, the Master has power to order either party to answer on oath before the trial certain questions submitted by his opponent. These questions are called "interrogatories". The Master goes through the proposed questions first to see if they are proper at that stage of the proceedings. There are, of course, limits to the power of a party thus to extract evidence in his favour from the lips of his opponent before the trial; these limits are defined in Chapters XVI. and XVII

Trial.

As soon as the pleadings are closed, the plaintiff usually (the defendant in some cases) gives Notice of Trial, and enters the action for trial in the official list of causes at the

Royal Courts. After a lapse of two or three months the name of the action appears in the "Week's List," and by-and-by in the "Day's List." Then the parties must attend in Court with their counsel and witnesses, and bring with them all necessary books and papers. The procedure at an ordinary trial is described in Chapter XIX. The plaintiff's counsel generally begins. He opens his case, calls his witnesses and examines them, and hands in his documents for the officer of the Court to read. The defendant's counsel cross-examines the plaintiff's witnesses, and then at the close of the evidence for the plaintiff, if there be any cause of action shown, he proceeds to meet it by stating what his defence is, and generally, but not always, by calling witnesses and putting in any documents on which he relies. The counsel then in turn address the jury, the judge sums up the case, the jury return their *verdict*, and the judge gives *judgment* in accordance with the verdict. On judgment follows *execution*, though execution is sometimes stayed in order that an application may be made to the Court of Appeal either for judgment or for a new trial.

Originating Summons

So far we have dealt solely with the procedure in an ordinary action commenced by a writ, and in the King's Bench and the Chancery Divisions of the High Court of Justice actions usually are commenced by a writ. But occasionally in the King's Bench Division, and more frequently in the Chancery Division, an action is commenced by what is called an "originating summons"*. There is no substantial distinction between a writ and an originating summons except this, that the use of the latter form of document implies that the parties (or some of them) desire to have the matter dis-

* It is not quite clear that every proceeding commenced by an originating summons is technically an "action," but most of them are

discussed in Chambers and not in open Court. They hope in this way to arrive at a judicial decision more economically and more expeditiously; though the matter is often adjourned from Chambers into Court. At first (from 1875 to 1893) originating summonses could only be taken out in the Chancery Division, and there only as to questions of law arising in the administration of an express trust or of the real or personal estate of a deceased person. But now, by Order LIVA r 1, "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." An "originating summons" is now defined to mean "every summons other than a summons in a pending cause or matter" (Order LXXI r 1A). The judge may direct such persons to be served with the summons as he may think fit, and the application must be supported by such evidence as the judge may require. The question to be determined must be clearly stated on the summons itself (see Precedent, No 40, in the Appendix), it must be a question of law, not of fact (*Lewis v Green*, (1905) 2 Ch. 340.) The parties generally agree on a "statement of facts." The judge, however, is not bound to determine any such question of construction in Chambers, if in his opinion it ought not to be determined on originating summons but by an action commenced in the usual way, in which formal pleadings can be delivered, and evidence given in open Court.

Proceedings not in an Action.

An action, then, is a civil proceeding commenced either by writ or originating summons. But there are many proceedings in the High Court besides actions. Proceedings in Admiralty and Probate are actions; but in Divorce pro-

ceedings the former procedure is retained and the old forms are adhered to. A Divorce suit is commenced by a *petition*; so are bankruptcy proceedings, and applications to wind up an insolvent company, or under the Trustee Act, 1893. These proceedings, therefore, are not actions. And there are many matters which come before the Court on what is called "a motion," *i.e.*, a summary application made to the Court, not necessarily in any action. Thus, in the case of a motion to attach a person who has committed a contempt of Court, or to enforce, vary or set aside an award, or to strike a solicitor off the rolls, though notice of the application must of course be given to the person affected, no writ or petition is served on him. Again, the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a "special case" for the opinion of the Court (Order XXXIV. r. 1); or a judge may direct any such question of law to be raised for the opinion of the Court by "special case" (*Ib.* r. 2); or an arbitrator or referee, or an inferior Court may state a "special case," and thus obtain the opinion of the High Court for their guidance. The practice with regard to petitions, motions, and special cases is necessarily different from the procedure in actions, and it is therefore not included in this volume.

CHAPTER II.

MATTERS TO BE CONSIDERED BEFORE WRIT.

IN many cases it is necessary for the plaintiff, even before he issues his writ, to consider certain details as to

I.—Parties.

II.—Joinder of causes of action.

III.—Jurisdiction of the Court.

To make a false start in any of these respects will cause him trouble, expense and delay at some stage or other of the action.

I.—PARTIES

There must be set out at the head of every writ the names of every plaintiff and every defendant whom it is proposed to make parties to the proceedings. These names form the title of the action. And in the selection of these parties there is a twofold chance of error. A plaintiff may omit parties whose presence is essential; or he may add parties whose presence is improper. Hence you must learn what parties are necessary and what unnecessary, who *must* be joined, and who *may* be joined or not, as the plaintiff chooses.

Formerly the law and practice as to “parties” was of the utmost importance, misjoinder of a plaintiff being ground of non-suit, while non-joinder of a necessary plaintiff was the subject of a plea in abatement*. But now no action “shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court

* Pleas in abatement were abolished in 1875. See Order XXI. r. 20, and *post*, pp. 145, 213.

may in every cause or matter deal with the matter in controversy. so far as regards the rights and interests of the parties actually before it" (Order XVI r 11) And "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just" (Order XVI r 2) This can be done although the original plaintiff had no cause of action (*Hughes v The Pump House Hotel Co, Ltd* (No 2), (1902) 2 K B 485)

Contract

In actions founded on contract, the law relating to parties depends largely on whether the contract sued on be joint, or several, or joint and several. This is a question which turns primarily on the language of the contract itself. Still, it is a question of the intention of the parties, and the judge will not confine his attention to their words, he will also have regard to all the surrounding circumstances, to the respective interests of the parties, and to their conduct. Thus, a contract made by the executors of a will, the trustees of a settlement, or the partners in a firm, with reference to the testator's estate, to the trust fund, or to the business of the firm, will generally be construed a joint and not a several contract, unless there is something in the language of the contract which forbids this construction. The distinction is one of importance; as, on the death or bankruptcy of one joint contractor, his rights or liabilities pass to the others and not to his personal representatives. Moreover, a judgment against one joint contractor, even though unsatisfied, is generally a bar to any action against the others: and a release given to one joint contractor releases all.

In any action for breach of a contract made with several

persons jointly, all of them who are alive and solvent must join as co-plaintiffs. In any action for breach of a contract made by several persons jointly, all of them who are alive and solvent must be joined as co-defendants "A joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors" (*Per* Bowen, L.J., in *In re Hodgson, Beckett v Ramsdale*, 31 Ch. D at p 188. And see *Pilley v. Robinson*, 20 Q B D. 155, and *McLeod v Power*, (1898) 2 Ch 295) The personal representatives of a deceased joint creditor should not be joined as plaintiffs, nor should the representatives of a deceased joint debtor be joined as defendants; the right to sue and the liability on the contract vest in the survivors, and therefore only the survivors should be made parties But if all the persons originally entitled to sue on such a joint contract be dead, the personal representatives of the last surviving creditor must sue. if all the persons originally liable on such a contract be dead, the personal representatives of the last surviving debtor must be sued.

If, however, the contract made by two or more persons be several as well as joint, the plaintiff may sue one or more or all of them in the same action. If he joins them all, he can in the same action claim against all of them jointly, and also against each of them severally (Order XVI. r 6) If he does not join them all, then he can only rely on the several liability of those whom he has chosen to sue.

If the contract be several and not joint, the plaintiff may, at his option, join as parties to the same action all or any of the persons liable thereon, and if any of the persons originally liable on that contract be dead, he may also, if he chooses, add the executors or administrators of such deceased persons

If a necessary co-plaintiff refuses to join in the action, the proper course, apparently, is to tender him an indemnity against

costs and then, if he still refuses to be joined as a co-plaintiff, to make him a defendant (*Cullen v Knowles and Burks*, (1898) 2 Q B 380, *In re Matheus*, (1905) 2 Ch 460) He cannot be joined as a co-plaintiff "without his own consent in writing thereto" (Order XVI r 11.) If he were joined as a co-plaintiff without his consent, his name will be struck out, and the solicitor who issued the writ will be ordered to pay his costs as between solicitor and client, and also all costs occasioned to the defendant by such improper joinder (*Fricke v Van Grutten*, (1896) 2 Ch 649. *Gold Reefs, Limited v Dawson*, (1897) 1 Ch 115, *Geilinger v. Gibbs*, *Ib* 479)

Tort.

In an action for a wrong arising out of a contract, the same persons must be joined as parties as are necessary in actions for breach of contract

In actions of pure tort (*i.e.*, for wrongs independent of any contract), if several persons are joint-owners or joint-occupiers of any land or premises prejudicially affected by any trespass, nuisance, or other wrongful act, or the joint-owners of any chattels which the defendant has taken, destroyed, or injured, whether by negligence or design, they should all, as a rule, be joined as co-plaintiffs in the action. But in all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest. (Order XVI r 37) And one of several co-owners of a patent may sue alone for an infringement of his right (*Sheehan v. G E Rail Co.*, 16 Ch. D 59), and so may one of several co-owners of a trade-mark (*Dent v Turpin*, 30 L. J. Ch. 495.)

But as to defendants in an action of tort, the plaintiff has a free hand. He is not now, and never was, obliged to join as a defendant every person who is liable to him for that tort. He may, if he prefers, sue only one or two; and the liability of the others will be no defence for those sued, and will not mitigate the damages recoverable, for all persons concerned

in a common wrongful act are jointly and severally liable for all damage caused by it (Co Litt 232, a; *Sutton v Clarke*, 6 Taunt. 29) But a judgment against these is a bar to any subsequent action for the same tort against anyone else who was *jointly* liable with them, even though the judgment in the first action has not been satisfied. (*Brinsmead v Harrison*, L R 7 C P 547, and *post*, p 223.) A mere covenant, however, not to sue one of two joint tort-feasors does not release the other from liability. (*Duck v Mayeu*, (1892) 2 Q B 511.)

Where special damage is essential to the cause of action the plaintiff should be careful to sue only that person whose act caused him the special damage, unless he can prove that some other person instigated the act complained of, in which case the instigator and the actor would be jointly liable for all damage flowing from the act

Recovery of Land

In this action the proper plaintiff is the person who is now entitled to immediate *possession* of the property. He may be the freeholder or only a tenant. If there be no tenancy created by, or otherwise binding on, the freeholder, then his ownership involves the right to present possession. And as between freeholders the first tenant for life is the proper plaintiff; there is no need to join any remaindermen or reversioners. Strictly all persons who are actually in physical possession of the property should be made defendants, and it is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land. (Common Law Procedure Act, 1852, s 168.) But where a large number of persons are in occupation of the premises who all claim title under the same lessor, the rule is relaxed and the plaintiff is allowed merely to make that lessor defendant. (*Minet v. Johnson*, 63 L. T 507; *Geen v. Herring*, (1905) 1 K. B. 152.) By sect. 209 of the same Act, the tenant is bound, under penalty of three

years' rent, "forthwith" to give notice to his landlord that a writ in ejectment has been served on him. And the landlord can then at once obtain leave to appear and defend the action under Order XII. rr. 25, 26, 27. The Master* will grant such leave on an *ex parte* application to any person who, by himself or his tenant, is in possession of the land sought to be recovered in the action, although he is not named on the writ.

Illustrations.

A person who seeks to recover possession of land upon an equitable title must make the person in whom the legal estate is vested a party to the action.

Allen v. Woods, 68 L. T. 143.

One tenant in common can sue alone, either in tort or contract, without joining his co-tenants in common as plaintiffs. But all joint tenants must join.

Roberts v. Holland, (1893) 1 Q. B. 665; 41 W. R. 494.

Lauri v. Renad, (1892) 3 Ch. 402; 61 L. J. Ch. 580; 40 W. R. 679; 67 L. T. 275.

By s. 59 of the Conveyancing Act, 1881, any covenant, bond or obligation under seal binds the real as well as the personal estate of the person making the same, although his heirs are not expressly named in it. The creditor is not bound, however, to sue both the real and personal representatives of the deceased; he may proceed against either or both. But if he elect to proceed against the real estate, and his deceased debtor by his will devised it away, then he must sue both the personal representative and the devisee (or, if necessary, the devisee of such devisee) in one action.

11 Geo. IV. & 1 Will. IV. c. 47, ss. 2, 3, 4.

Land Transfer Act, 1897, ss. 1, 2, 3; and see Precedent, No. 48.

Where a libel has appeared in a newspaper, the person libelled may join as defendants in the same action the proprietor, the editor, the printer, and the publisher, or any one or more of them, as he thinks fit; for all are jointly and severally liable for the publication and its conse-

* The Rules of the Supreme Court always use the phrase "the Court or a judge." But such interlocutory applications are always heard and disposed of by a Master, or District Registrar; and only come before the Court or a judge on an appeal from him (see *post*, p. 336). Hence it is less misleading to say "the Master."

quences. If he thinks fit to sue some only of those who are liable to him, those whom he sues cannot subsequently claim contribution from the rest

Colburn v. Patmore 1 Cr. M. & R. 73, 4 Tyr. 677

Merryweather v. Nixan, 8 T. R. 186; 1 Smith, L. C. (11th ed.) 398

Classes of Persons.

A married woman may now sue and be sued, either in contract or tort or otherwise, in all respects as if she were a *feme sole*; and her husband need not be joined with her as plaintiff or defendant. (Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1.) If, however, the husband has sustained any special damage, he should join as a co-plaintiff, so as to dispose of all questions in one action. And a plaintiff who has a cause of action against a married woman may sometimes prefer to sue the husband, or both husband and wife, if he can; especially if the wife is restrained from anticipating her separate property. On a parol contract made by a married woman since the marriage, it is now practically impossible for *both* husband and wife to be liable; for either the wife was agent for her husband to make that contract on his behalf, or she was not. If she was, then he alone is liable. If she was not, he cannot be liable, but she is; for she shall be deemed to have entered into the contract with respect to and intending to bind her separate estate, and this* whether she was or was not in fact possessed of or entitled to any separate estate when she made the contract (56 & 57 Vict. c. 63, s. 1). See *Morel Brothers v. Earl of Westmorland*, (1904) A. C. 11; *French v. Howie*, (1905) 2 K. B. 580; (1906) 2 K. B. 674. It is not necessary to join the trustees of her separate estate as co-defendants (*Davies v. Jenkins*, 6 Ch. D. 728, 730.)

But a husband is still liable to the full extent for any tort

* The law is different in the case of a contract made by a married woman prior to December 5th, 1893.

committed by his wife since their marriage. There is nothing in any of the Married Women's Property Acts removing or restricting the common law liability of the husband in this respect. (*Seroka and Wife v Kattenburg and Wife*, 17 Q B D 177; *Eale v Kingscote*, (1900) 2 Ch. 585:)* Hence a plaintiff who sues for a tort committed by a married woman during her coverture generally sues both husband and wife in the old common law way. And if the husband is thus compelled to pay damages and costs for the tort of his wife committed during coverture, he has apparently no remedy over against her separate estate.

An infant sues by his next friend (see Precedent, No 58), who is personally liable for the costs of the suit, but the infant is *primâ facie* liable to indemnify him against costs properly incurred in the interest of the infant. (*Steeden v. Walden*, (1910) 2 Ch. at p. 400) He defends by a guardian *ad litem*, who will not be held personally liable for costs unless he has been guilty of some misconduct. (Order XVI. rr. 18, 19, Order LXV. r. 13.)

A lunatic sues by his next friend, and defends by a guardian *ad litem*, if he has not yet been found of unsound mind by inquisition. If he has been, then he both sues and defends by his committee, who, before commencing any action, must obtain the sanction of a Lord Justice (*Farnham v. Milward & Co.*, (1895) 2 Ch at p. 735, *Lord Townshend v. Robins*, (1908) 1 Ch 201) If his committee has any adverse interest, someone else must be appointed next friend or guardian.

Partners now may sue and be sued in the name of their firm, but if they sue in the firm name they can be compelled to disclose the name and address of every member of the firm. (Order XLVIII. r. 1, *Abrahams v. Dunlop P. T. Co.*, (1905)

* But see the observations of Moulton, L. J., in *Cuenod v Leslie*, (1909) 1 K. B. at pp. 886—890, which call in question, but cannot overrule, the doctrine laid down above.

1 K B 46.) If they are sued in the firm name they must enter an appearance in their own names individually, but the subsequent proceedings may continue in the name of the firm (r. 5; and see *Ellis v. Wadeson*, (1899) 1 Q. B. 714).

A corporation and a company limited sue and are sued in their corporate name, they are legal persons. And a trades union, though not a legal person, may be sued in its own name whether it be registered or unregistered (*Taff Vale Ry Co v. Amalgamated Society of Railway Servants*, (1901) A. C. 426)

In any action concerning trust property, all the trustees within jurisdiction must as a rule be joined; in any action concerning the estate of a deceased person all administrators, or all executors who have proved the will, must be joined (See *Latch v Latch*, L R. 10 Ch 464) But in neither case is it necessary to add any of the persons beneficially interested in the trust or estate. (Order XVI. r. 8.)

Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized to defend in such cause or matter, on behalf or for the benefit of all persons so interested. All persons who have a common right which is invaded by a common enemy are entitled to join in attacking that common enemy in respect of that common right, although they may have different rights *inter se* (Order XVI r 9, *Warwick v. Queen's College, Oxford*, L R 6 Ch 716, 726; *Duke of Bedford v. Ellis*, (1901) A. C. 1, but see *Markt & Co., Ltd. v. Knight Steamships Co, Ltd*, (1910) 2 K. B. 1021.)

Illustrations.

As a rule, it is unnecessary to make the representative of a deceased trustee or executor a party to an action, if there be a surviving trustee or executor.

In re Harrison, Smith v Allen, (1891) 2 Ch 349, 60 L J. Ch. 287, 64 L T 442.

Where a legacy was bequeathed to A., in trust for X and Y., and A. was made defendant, it was held unnecessary to join X. and Y. as parties to the action, as they were represented by their trustee

In re Bouden, Andrew v Cooper, 45 Ch. D. 444; 59 L. J. Ch. 815, 39 W. R. 219

Whiting v. De Rutzen, (1905) 1 Ch. 96, 74 L. J. Ch. 207.

A married woman cannot be a guardian *ad litem*.

In re Duke of Somerset, 34 Ch. D. 465, 56 L. J. Ch. 733

Hence the memorandum of appearance should always state whether a female guardian *ad litem* is a spinster or a widow.

London and County Bank v. Bray, (1893) W. N. 130.

One shareholder in a company may sue "on behalf of himself and all other the shareholders" in that company for a declaration that the payment of a certain dividend was *ultra vires* and illegal.

Stroud v. Lawson and others, (1898) 2 Q. B. 44; 67 L. J. Q. B. 718; 46 W. R. 626; 78 L. T. 729

So, one or more of the co-adventurers in a cost-book mine may now sue or be sued on behalf of the whole number, under

Order XVI. r. 9

Under this rule the officers of an unincorporated society may be compelled against their will to defend an action on behalf of the society

Wood v. McCarthy and another, (1893) 1 Q. B. 775; 62 L. J. Q. B. 373, 41 W. R. 523; 69 L. T. 431

A mortgagor who is entitled for the time being to possession of the mortgaged property, or to receive the rents and profits of it, may sue for possession of it, or to recover such rents or profits, or to prevent, or recover damages in respect of, any trespass or other wrong done to it, without joining his mortgagee as a co-plaintiff.

Judicature Act, 1873, s. 25, subs. (5).

Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10, subs. (1).

Turner v. Walsh, (1909) 2 K. B. 484, 78 L. J. K. B. 753; 100 L. T. 832.

The assignee of any legal chose in action may sue for it without joining his assignor as a co-plaintiff, provided the assignment be absolute and in writing under the hand of the assignor, and provided notice in writing of the assignment has before action been given to the debtor or holder of the fund.

Judicature Act, 1873, s. 25, subs. (6).

Hughes v. Pump House Hotel Co. (No. 1), (1902) 2 K. B. 190; 71 L. J. K. B. 630; 50 W. R. 660, 86 L. T. 794

Dawson v. Gl. N & City Ry., (1905) 1 K. B. 260; 74 L. J. K. B. 190; 92 L. T. 137.

II.—JOINDER OF CAUSES OF ACTION.

The Judicature Act gave a plaintiff a very extensive power of joining on one writ several different causes of action. And in a proper case the plaintiff should certainly avail himself of this power. For if he brings two actions unnecessarily where one would have sufficed, he will probably have to pay the costs of one action.

Take the simplest case first.—

1. Where the parties are the same in all the causes of action which it is sought to join.

The plaintiff may join on one writ any number of different causes of action against the same person or persons To this rule there are only three exceptions.—

- (a) Claims by a trustee in bankruptcy, as such, may not, except by leave of a Master, be joined with any claim by him in any other capacity (Order XVIII r. 3)
- (b) Claims by or against an executor or administrator, as such, may not be joined with claims by or against him personally, unless the latter claims are alleged to arise with reference to the estate of which he is executor or administrator. (Order XVIII. r. 5; *Whitworth v. Darbshire and others*, 41 W R 317; 68 L T. 216.)
- (c) No cause of action may, without leave, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent, or double value, or damages for breach of any contract under which the land is held, or for any wrong or injury done to it. (Order XVIII r. 2.) The plaintiff may join no other cause of action; but the same cause of action may entitle him to relief of various kinds.

Thus, no leave is required to join a claim for an injunction, or for an account of rents and profits, or for a receiver, or for any declaration that merely establishes the plaintiff's right to possession for all these things are simply machinery to enforce the plaintiff's one cause of action (*Gledhill v Hunter*, 14 Ch. D 492)

Leave should strictly be asked for and obtained before the writ is issued, but it can be obtained subsequently (*Lloyd v Gt W Dairies Co*, (1907) 2 K. B 727) And if claims be improperly joined without leave, still this irregularity is waived if the defendant, without raising the objection, takes a step in the action, which would be neither necessary nor useful if he intended to rely on that objection (*Per Cave, J*, in *Rein v Stein*, 66 L T at p 471) He is supposed to know the law, and thus has notice of the irregularity as soon as he sees the writ or pleading (*Mulckern v Doercks*, 53 L J Q B 526) As to what is a "step in the action," see *post*, p 213

Subject to these exceptions, the plaintiff may unite in the same action any number of causes of action in which all parties are concerned But if the defendant subsequently can convince a Master that the causes of action which the plaintiff has joined cannot be conveniently tried or disposed of together, the Master may order one or more of them to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just (Order XVIII rr 1, 7, 8, 9)

Now we come to cases of more difficulty, where not every plaintiff or not every defendant is interested in every cause of action joined

2. When may two or more plaintiffs join on one writ distinct and separate causes of action against the same defendant or defendants?

In three cases they clearly may —

- (a) "Claims by plaintiffs jointly may be joined with claims by them, or any of them, separately against the same defendant." (Order XVIII r 6)
- (b) Claims by or against husband and wife may be joined with claims by or against either of them separately. (Order XVIII r 4)
- (c) And, generally, unconnected persons who have each a distinct and separate cause of action against the same defendant may join in one writ whenever their separate causes of action arise out of the same transaction or series of transactions, and involve any common question of law or fact (Order XVI r. 1); but in no other case (*Smurthwaite v Hannay*, (1894) A C 494, *Carter v Rugby & Co*, (1896) 2 Q. B. 113)

But even in these three cases, if any defendant can show that the joinder of such causes of action may embarrass or delay the trial of the action, the Master may order separate trials, or make such other order as may be expedient. If, however, the action goes to trial with such joinder undisturbed, and one plaintiff succeeds and the other fails, the defendant will be entitled to his costs occasioned by joining the plaintiff who failed, unless the judge otherwise directs. (Order XVI r 1)

Illustrations.

Persons who have separate interests in the same premises may join as co-plaintiffs in an action in respect of any injury done to those premises. Thus, the owner and the tenant of a house may sue together for an injunction to restrain a nuisance to that house

Viscount Gort and others v Rowney, 17 Q. B. D. 625, 55 L. J. Q. B. 541, 34 W. R. 696, 54 L. T. 817.

Moreover, the owners and tenants of two or more adjoining houses may all join in one action to restrain, or to recover damages for, any nuisance or other injury which affects their respective properties, though

to different extents, provided such nuisance or injury is caused by the same acts of the same person

House Property Co. v. Horse Nail Co, 29 Ch D 190, 54 L J Ch. 715; 33 W. R. 562; 52 L. T. 507

If a committee, or trustees, or any other defined body of persons be libelled or slandered collectively as a body in respect of the performance of their official duties, they may all join in one action

Booth and others v. Briscoe, 2 Q. B D 496, 25 W R 838

But if A defames B on one occasion, and C on another, B and C cannot join as co-plaintiffs in one action against A, even though the charges be "historically" connected, for each slander is a separate "transaction"

Sandes and another v. Wildsmith and another, (1893) 1 Q. B. 771, 62 L. J. Q. B. 404; 69 L. T. 387.

The Universities of Oxford and Cambridge were allowed to join in one action to restrain a publisher from selling his books as "The Oxford and Cambridge Publications"

Universities of Oxford and Cambridge v. Gill, (1899) 1 Ch. 55; 68 L J Ch. 34, 47 W. R. 248, 79 L. T. 338.

Four persons who have been separately induced to take debentures on the faith of erroneous statements contained in the same fraudulent prospectus may join as co-plaintiffs under Order XVI r. 1 in an action against the directors.

Drumgblie v. Wood, (1899) 1 Ch. 393, 68 L. J Ch. 181; 47 W. R. 252; 79 L T 548

And see *Walters v. Green*, (1899) 2 Ch 696, 68 L. J. Ch. 730; 48 W. R. 23, 81 L. T. 151.

But see the dictum of Joyce, J., in *Price v. Clinton*, (1906) 2 Ch. at p 489

But where a plaintiff claims certain relief in his personal capacity, and certain other relief on behalf of himself and all other the shareholders in a certain company, he cannot join those two claims on one writ, unless the right to relief in each case arises out of the same transaction or series of transactions. It is not enough for him to show that a common question of law or fact will arise.

Stroud v. Lawson and others, (1898) 2 Q. B. 44; 67 L. J. Q. B. 718, 46 W. R. 626; 78 L. T. 729

Walters v. Green, *supra*.

Great North-West Central Ry Co v. Charlebois, (1899) A. C. 114; 68 L. J P. C 25, 79 L T 35.

3. When may the same plaintiff or plaintiffs join on one writ separate and distinct causes of action against different defendants?

The Rules of Court bearing on this question are as follows —

“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.” (Order XVI. r. 4)

“It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceeding in which he may have no interest.” (*Ib* r. 5.)

The language of these rules seems to be clear and conclusive, but the practice under them has from the first been confused and confusing.

It is necessary to deal with three separate cases.—

(1) When a plaintiff alleges that two or more persons are all jointly liable to him on several different causes of action, whether sounding in tort or in contract, he may join them all on one writ (*ante*, pp 14, 16). This has always been clear law. But it is not clear law whether he may also join on this writ any separate cause of action against one or more of the defendants severally It was decided in *Pope v. Hawtrey and another*, 85 L. T. 263, 17 Times L. R. 717, that in an action brought against several defendants for a joint tort the plaintiff could not join in the same action separate claims against one or more of the defendants individually for any other independent tort. This decision unfortunately was not cited to the Court during the argument of either of the cases of *Bullock*

v *L G O Co* or *Compania Sansinena de Carnes Congeladas* v *Houlder Brothers & Co, Ltd*, *infra* It is difficult, therefore, to decide how far, if at all, it is overruled by the later cases

(ii) Where a plaintiff has but one cause of action, which entitles him to judgment against either A or B but not against both, he may join A and B on the same writ as defendants in the alternative, and so determine the question which of them is liable (Order XVI r 7, *Thompson v L C C*, (1899) 1 Q. B. 840) In such a case he will probably have to pay the costs of the defendant who is held not liable, though he may recover them back again from the defendant who is liable if he can satisfy the judge that this defendant was guilty of any misrepresentation, or collusion, or other misconduct in the matter (*Sanderson v Blyth Theatre Co*, (1903) 2 K B. 533; *Bullock v L G O Co*, (1907) 1 K B 264.)

(iii) But where a plaintiff seeks to recover judgment against A on one cause of action, and at the same time to recover judgment against B. on a separate and distinct cause of action, it is difficult to say in any given case whether he can or cannot join these two causes of action on one writ

From 1896 to 1906 it was clear law that he could not do so in any case The House of Lords decided in *Sadler v G W Ry Co and Midland Ry Co*, (1896) A C 450, that claims for damages against two or more defendants in respect of separate torts cannot be combined in one action And the rules relating to the joinder of defendants have not been modified in any way since this decision, to make them correspond with the amendment made in October, 1896, in the rule as to joinder of plaintiffs (Order XVI r 1) Hence, it was held in *Gower v Couldridge and others*, (1898) 1 Q B 348, that the decision in *Sadler's Case* still remained clear law But it has now been decided by the Court of Appeal that there is power under Order XVI r 4, to join several defendants in the same action for the purpose of claiming relief against them jointly, severally, or in the alternative, and

that this power is not confined to cases in which the causes of action alleged against the several defendants are identical, but extends to all cases in which the subject-matter of complaint against the several defendants is substantially the same, although the respective causes of action against them are different in form, and their respective liabilities are to some extent based on different grounds (*Bullock v L. & O. Co*, (1907) 1 K B 264, *Compania Sansimena de Carnes Congeladas v Houlder Brothers & Co, Ltd*, (1910) 2 K B 354) It was thought apparently that the alteration made in the wording of Order XVI r 1, which only applies to plaintiffs, had in some way rendered incorrect the construction placed by the House of Lords in *Sadler's Case* upon rr 4 and 5 of the same Order, which apply only to defendants, and which remain unaltered If so, the decision in *Gower v Couldridge* must be taken to be overruled

Illustrations

But where several persons conspire to do the plaintiff an injury, and succeed, he may join them all as co-defendants on one writ, for the cause of action against them is joint.

Walters v. Green, (1899) 2 Ch 696, 68 L J Ch 730, 48 W. R. 23; 81 L T 151

O'Keefe v Walsh, (1903) 2 Ir. R 681

But it was held that he cannot join in the same action separate claims against one or more of the defendants individually for torts independent of the alleged conspiracy

Pope v. Hawtrey and another, 85 L. T. 263, 17 Times L. R 717.

A. and B promoted a company, of which they and C became directors; the three then issued a misleading prospectus. Held, that the plaintiff, who had been thereby induced to take shares in the company, could not join in one action a claim against A and B. for conspiracy, with a claim against A., B. and C for fraudulent misrepresentation.

Gower v. Couldridge and others, (1898) 1 Q. B 348, 67 L J. Q. B. 251, 46 W R. 214, 77 L T 707

The plaintiff was injured by a collision between an omnibus and a cart He brought an action against the owners of both vehicles charging them both jointly and severally with negligence The jury found negligence on the part of the driver of the omnibus, and negatived negligence on the part of the driver of the cart The judge entered judgment for the plaintiff against the first-named defendant, and judgment for the successful defendant, with costs in each case. The judge further ordered

that the costs so payable by the plaintiff should be included in the costs recoverable from the first-named defendant

Bullock v. L G O. Co, (1907) 1 K. B. 264, 76 L. J. K. B. 127, 95 L. T. 905,

approved in

Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co, Ltd., (1910) 2 K. B. 354, 79 L. J. K. B. 1094; 103 L. T. 333

A plaintiff may join in one action a claim against a principal on a contract made by his alleged agent, and an alternative claim against the alleged agent for contracting without authority

Honduras Ry Co v. Lefevre & Tucker, 2 Ex. D 301, 46 L. J. Ex. 391, 25 W. R. 310, 36 L. T. 46.

Massey v. Heynes, 21 Q. B. D. 330, 57 L. J. Q. B. 521, 36 W. R. 834; 59 L. T. 470.

Bennetts v. McIlwraith, (1896) 2 Q. B. 464, 65 L. J. Q. B. 632, 45 W. R. 17, 75 L. T. 145

So where A. has trespassed on B.'s land, and claims a right to do so under a grant of a right of way from B.'s landlord prior in date to B.'s lease, B. may join a claim against A. for trespass with an alternative claim against the landlord for damages in the event of A. establishing his right

Child v. Stenning, 5 Ch. D. 695, 46 L. J. Ch. 523; 25 W. R. 519; 36 L. T. 426.

If the same libel appear in seventeen newspapers, the person libelled must bring seventeen actions, one against each newspaper, if he desires to recover damages from them all (though an action against one would sufficiently clear his character). He cannot make the seventeen proprietors defendants to one suit

Colledge v. Pike, 56 L. T. 124, 3 Times L. R. 126.

But the seventeen actions can be consolidated on the application of the defendants under sect 5 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), or on the application of the plaintiff with the consent of the defendants

Stone v. Press Association, Limited, (1897) 2 Q. B. 159, 66 L. J. Q. B. 662, 45 W. R. 641, 77 L. T. 41

Lee v. Arthur (1908), 100 L. T. 61.

The plaintiff had a bicycle shop which stood, unfortunately for him, between the parcel-office of the Great Western Railway Company and the parcel-office of the Midland Railway Company. The first company obstructed the access to his premises on the north side; the second on the south; and between them they seriously injured his business. *Held*, that these were two separate torts committed by two independent tort-feasors,

and gave rise to two distinct causes of action which could not be joined on one writ.

Sadler v. G. W. Ry. Co. & Midland Ry. Co., (1896) A. C. 450;
65 L. J. Q. B. 462; 45 W. R. 51; 74 L. T. 561.

Greenwood v. Greenwood (1908), 100 L. T. 68.

A county council damaged the plaintiff's house by negligently excavating near it. A water company contributed to the damage by negligently leaving their water-main insufficiently stopped. *Held*, that though the damage to the plaintiff's house was the same, whatever the cause, the county council and the water company could not be joined as defendants in the same action.

Thompson v. London County Council, (1899) 1 Q. B. 840; 68
L. J. Q. B. 625; 47 W. R. 433; 80 L. T. 512.

But see *Frankenburg v. Great Horseless Carriage Co.*, (1900)
1 Q. B. 504; 81 L. T. 684.

Kent Coal Exploration Co., Limited v. Martin and others (1900),
16 Times L. R. 486.

4. Separate causes of action with different plaintiffs and also different defendants can never be joined on the same writ.

This last case presents no difficulty.

If A. has a several cause of action against B., and X. has a wholly distinct and independent cause of action against Y., A. and X. cannot issue one writ against B. and Y., even though their separate actions arise out of similar transactions and involve similar questions of law or fact. The only thing that can be done, if there be many such actions, is for all parties to agree that one shall be taken as "a test action," and that the others shall be stayed till that one is tried, and then follow its event.

III — JURISDICTION

Next, the plaintiff must select the Court in which he will sue. The High Court of Justice has certain humble rivals in the Borough Courts and the County Courts. The jurisdiction of these inferior Courts is limited by certain geographical considerations as to where the cause of action arose, and where the defendant resides, in the County Court also the amount which the plaintiff can claim is restricted (See *post*, p. 350). But the High Court of Justice has jurisdiction over the whole of England and Wales, and no limit is placed on the amount which a plaintiff can claim or recover. The High Court has also a general jurisdiction over all injuries done by one Englishman to another in any corner of the world, whether in an English colony or in a foreign country (*Scott v. Lord Seymour*, 1 H. & C. 219; 32 L. J. Ex. 61), and also over injuries done by one alien to another abroad, provided such injuries be actionable by the law of England and also wrongful by the law of the country where they were committed. (*Machado v. Fontes*, (1897) 2 Q. B. 231; *Carr v. Francis Times & Co*, (1902) A. C. 176). But the Court has of its own accord restricted these wide powers to cases in which the defendant is within jurisdiction (*Watkins v. North American, &c. Co*, 20 Times L. R. 534) at the time the writ is issued, so that it can be served upon him here. If the defendant is out of jurisdiction, no writ can be issued except by leave (Order II. r. 4), and such leave will only be granted in the cases specified in Order XI. (*In re Eager, Eager v. Johnstone*, 22 Ch. D. 86.) Thus, leave will be readily granted if the whole subject-matter of the action be land situate within jurisdiction, or the construction, rectification, avoidance, or enforcement of any deed, will, contract, obligation or liability affecting land

or hereditaments within jurisdiction. Such matters by international law belong to the *forum rei sitæ*. Again, leave can be obtained to issue a writ against any one who is not domiciled or ordinarily resident in either Scotland or Ireland, for any breach within jurisdiction of a contract which ought to be performed within jurisdiction. (*Charles Duval & Co v. Gans*, (1904) 2 K B. 685.) It does not matter where the contract was made. And it will be sufficient if a part of the contract has been broken, provided that part had to be performed within jurisdiction. (*Rein v Stern*, (1892) 1 Q B 753, 757, *Comber v. Leyland*, (1898) A. C. 524, *Mutzenbecher v Espanola*, (1906) 1 K B. 254.) But there is much greater difficulty in obtaining leave in an action of tort. Such actions are not expressly mentioned in the Order.

It is possible, however, to bring even an action of tort under one or other of clauses (e), (f), (g), of rule 1 of Order XI. Thus it may be that the proposed defendant, though temporarily abroad, is "domiciled or ordinarily resident within the jurisdiction" (c). But though a man carries on business within jurisdiction, whether in his own name or under any other style or firm, he cannot be sued here, if he resides abroad. (*Field v Bennett*, 56 L J Q B 89; *De Bernales v. New York Herald*, (1893) 2 Q B 97, n.; *De Bernales v. Bennett* (1894), 10 Times L R. 419, *MacIver v Burns*, (1895) 2 Ch 630.) And there can be no substituted service of a writ in an action in which there cannot in law be personal service. (*Wilding v. Bean*, (1891) 1 Q. B. 100; *Jay v. Budd*, (1898) 1 Q. B. 12.) A foreign company will be deemed to be resident within jurisdiction if it is conducting its business, or a material part of it (e.g. either manufacture or sale) at some fixed place in this country for a substantial period of time. (*La "Bourgogne"*, (1899) A. C. 431; *Dunlop Pneumatic T. Co v. Actien, &c.*, (1902) 1 K. B. 342; *Saccharin Corporation, Ltd v Chemische Fabrik Von Heyden*, (1911) 2 K B. 516.) And now every

foreign company which establishes a place of business within the United Kingdom must within one month from doing so file with the Registrar of Companies the name and address of some person resident in the United Kingdom who is authorized "to accept on behalf of the company service of process and any notices required to be served on the company" (Companies (Consolidation) Act, 1908 (8 Edw VII, c 69), s 274 (c))

The plaintiff may obtain leave under Order XI r 1 (f) if he adds a claim for an injunction on his writ (*Tozier and Wife v Hawkins*, 15 Q. B. D. 650, 680, *Lasbon-Berlyn Gold Fields, Limited v. Heddle*, 52 L. T 796.) But the judge at chambers, when granting leave to serve the writ out of jurisdiction, may, if he think fit, limit the plaintiff to that portion of his claim in respect of which it shall appear at the trial that the writ could have been properly served out of jurisdiction (*Thomas v Duchess Dowager of Hamilton*, 17 Q B D 592) Under clause (g), where the writ has already been duly served on a defendant within jurisdiction, leave will be given in a proper case to serve another defendant who is outside jurisdiction, provided he be a necessary and proper party to the action. (*Croft v King*, (1893) 1 Q B. 419; *Williams v. Cartwright and others*, (1895) 1 Q B 142, *Duder v Amsterdamsch Trustees Kantoer*, (1902) 2 Ch 132; *Alexander v Valentine* (1908), 25 Times L. R. 29) If the proposed defendant is a British subject, he can (by leave) be served with the writ though he reside abroad; but by international courtesy, a foreigner residing abroad can only be served with notice of the writ, not with the writ itself. (Order XI. rr. 6, 8) Leave can also be obtained to serve with the writ, or notice of the writ, notice of motion for an interlocutory injunction (Order LII r 9, *Overton v Burn*, 74 L. T. 776.)

There is one curious exception to the jurisdiction of the High Court. If the defendant be a member of the University of

Oxford resident within its limits, he must be sued in the University Court, although the plaintiff be in no way connected with the University or resident within its limits, and although the cause of action did not arise within those limits. (*Ginnett v Whittingham*, 16 Q. B. D. 761.) In the University of Cambridge there is a similar rule, save that the privilege cannot be claimed if any person not a member of the University is a party to the action. (19 & 20 Vict. c. xvii., s. 18.)

CHAPTER III

INDORSEMENT ON WRIT.

ON every writ the plaintiff must state clearly the Division of the High Court in which he intends to sue, the name of the judge, if any, to whom the action is assigned (*ante*, p. 4), and the names of all parties. If any party sues, or is sued, in a representative character, this fact should also be stated on the writ. (See Precedents, Nos 1, 11, 29, 31, 36) The plaintiff must also make on the writ before it is issued an "indorsement of claim"—that is, a statement as to the nature of his claim and the relief or remedy which he seeks—so as to let the defendant know why he is sued. There are now four different kinds of indorsement of claim —

- I.—A general indorsement,
- II —An indorsement for trial without pleadings,
- III —An indorsement for an account; and
- IV.—A special indorsement (which is really a pleading).

Which kind of indorsement should the plaintiff make on his writ?

This is sometimes an important question, and one on which the plaintiff would be wise to consult the counsel who will conduct his case at the trial. If the case is of such a nature that it falls within Order III. r. 6 (*post*, p. 42), and if there is any reasonable chance of obtaining judgment under Order XIV., then the plaintiff should specially indorse his writ with a Statement of Claim. In other cases, if he desire

to have pleadings, he should indorse his writ generally and take out a summons for directions (see *post*, Chapter VI.) as soon as the defendant has entered an appearance. If he cannot claim a specific amount, because he does not know how much his trustee or agent has in fact received on his behalf, then he had better claim an account and proceed against him under Order XV. If, however, the plaintiff desires to proceed promptly to trial, and is willing to dispense with pleadings altogether, he may adopt the procedure provided by Order XVIII^A., and indorse his writ with a statement that he intends to proceed to trial without pleadings. But if the plaintiff is not ready with the evidence necessary for his case, or if he is in the dark as to the nature of the defence which will be set up at the trial, then he should place on his writ a general indorsement, and apply to the Master for leave to deliver a Statement of Claim.

I proceed to deal separately with each kind of indorsement of claim

I.—A GENERAL INDORSEMENT

This is merely a label to show to what class of action the suit belongs. It is expressly provided that in such an indorsement it shall not be essential to set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled. (Order III r. 2.) There is one exception. in actions of libel, a general indorsement must "state sufficient particulars to identify the publications in respect of which the action is brought" (R 9, see Precedent, No. 5)

The exact wording of a general indorsement may become important, if the defendant does not appear, or if the Master refuses to order pleadings, but if the Master order pleadings, a Statement of Claim will be delivered in due course, stating everything in proper form. The plaintiff may not (without leave) introduce in his Statement of Claim a fresh cause of action wholly distinct from anything mentioned on his writ. (*Cave v. Crew*, 62 L. J. Ch. 530.) But apart from this, the indorsement on the writ, if general, in no way fetters or limits the future Statement of Claim. For by Order XX. r. 4, "whenever a Statement of Claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement on the writ" But this rule does not apply where the defendant has not appeared (*Gee v. Bell*, 35 Ch D. 160, *Kingdon v. Kirk*, 37 Ch. D. 141, *Southall Development Syndicate, Ltd. v. Dunsdon*, 96 L. T. 109.) Hence, whenever there is any chance of judgment going by default, even a general indorsement must be carefully prepared. (See Precedents, Nos. 3—8.)

II —INDORSEMENT FOR TRIAL WITHOUT PLEADINGS.

(Order XVIII A)

The Rules of November, 1893, enable a plaintiff, if he wishes, to proceed to trial without pleadings, subject to certain conditions, one of which is that "the indorsement of the writ of summons shall contain a statement sufficient to give notice of the nature of his claim, or of the relief or remedy required in the action, and shall state that if the defendant appears the plaintiff intends to proceed to trial without pleadings." This indorsement is not a pleading, for the plaintiff has decided to proceed to trial without any pleading. Something more precise than a general indorsement seems to be required, but not all the detail necessary in a special indorsement, which is really a Statement of Claim. The words "if the defendant appears, the plaintiff intends to proceed to trial without pleadings," must be added, otherwise Order XVIII A will not apply.

Some care is necessary in drafting an indorsement of this kind, for the plaintiff will be bound by it. There will be no Statement of Claim by which to "alter, modify, or extend his claim", and amendments will only be allowed upon terms. On the other hand, Order XIX r 6 does not apply to indorsements of this kind. Hence, a plaintiff who desires to go to trial without pleadings is not bound to set out on his writ particulars of special damage, expenses, &c. Still, as the object of this new procedure is expedition, it will be well to forestall any dilatory application by the defendant for particulars under rule 3 of this Order (*post*, p 62) by voluntarily stating in the indorsement all that the defendant can reasonably require to know. (See Precedents, Nos. 9—28.)

III —INDORSEMENT FOR AN ACCOUNT.

If a rent-collector, or a commercial traveller, or any other agent or trustee, has received money on behalf of the plaintiff, he is what is called "an accounting party", that is, he is bound within a reasonable time after demand to render an account of all moneys received by him, showing how much he has paid over to the plaintiff and how much he still has in hand. It is of great importance to the plaintiff to have such an account, he does not know how much money the defendant has in fact received on his behalf, and therefore he does not know what sum to claim on the writ. In such a case he would indorse his writ with a claim to have an account taken under Order III. r. 8. (See *Augustinus v Nermekx*, 16 Ch. D. 13, 17, and Precedents, Nos 29, 30, and 31.) If the defendant does not appear to such a writ, an order for the account claimed will be forthwith made as of course, if he does appear, the order will nevertheless be made, unless the defendant can show that he is not an accounting party, or that he has already fully accounted, or that there is some preliminary question to be tried (Order XV r. 1) The application for such order may be made at any time after the time for entering an appearance has expired; if the defendant has appeared, it must be made on a summons for directions. And indeed at any stage of the proceedings in any cause or matter the Court or a judge may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried. (Order XXXIII. r. 2.)

This method of obtaining an account was borrowed from the Court of Chancery, it is of the greatest utility. It is true that

an action lay at common law against a bailiff or receiver, or by one merchant against another in respect of their mutual dealings as merchants, for not rendering a reasonable account of profits. And by the statute 4 & 5 Anne, c. 16, s. 27, an action of account might be brought by one joint-tenant or tenant in common against the other, as bailiff, for receiving more than his just share or proportion (*Henderson v Eason* (1851), 17 Q B 701). But in the face of the extensive jurisdiction of the Courts of Equity, in all matters of account, these common law actions became practically obsolete, and now, in either Division of the High Court (*York v Stowers*, (1883) W N 174), a plaintiff may indorse his writ with a claim for an account.

If an order be made on such an application, the account may be taken by a Master, or a District Registrar (*In re Bowen*, 20 Ch D 538), or by a special referee or an official referee under either sect. 13 or sect. 14 of the Arbitration Act, 1889 (*Rochefoucauld v Boustead*, (1897) 1 Ch 196). A special referee is an arbitrator or umpire appointed by the parties, an official referee is an officer of the Court to whom questions of account may be referred by the order of a judge or Master. A referee is not bound to take the account in the strict way usually adopted before a Master in Chancery Chambers, he may adopt that method if he thinks it convenient, or any other method that in his opinion will best advance the ends of justice (*In re Taylor, Turpin v. Parn*, 44 Ch D 128. See Seton, Vol II c 43, 6th ed, pp 1352—1379, and Precedents, Nos. 46, 47). The first step generally is for the defendant to deliver an account. Thus the plaintiff proceeds to criticize. If he can shew that the defendant has taken credit for payments which he never made, he can have the items struck out; that is called "falsifying". If he can shew that the defendant has received moneys with which he has not debited himself, the plaintiff can have these items added; that is called "surcharging." When this process has been exhausted, the referee will have arrived at a correct account, and can then make an order that the defendant shall pay the plaintiff the balance shewn by such account to be due to him.

✓ III —STATEMENTS OF CLAIM.

(1) IN ACTIONS FOR BREACH OF CONTRACT.

No 46

AGENT LIABLE TO ACCOUNT

1 The plaintiff is a merchant in England, having business transactions on the West Coast of Africa

2. On September 2nd, 1909, the plaintiff appointed the defendant his agent for the collection of certain debts due to him on the West Coast of Africa, and, for the purpose of such collection, delivered certain securities to the defendant

3 The defendant did not collect all the said debts; he has not accounted for any of the said debts, and he disposed of certain of the securities without collecting the said debts

4 The plaintiff also claims a sum of 194*l*, balance due from the defendant to the plaintiff for the price of goods sold and delivered by the plaintiff to the defendant, and for moneys received by the defendant to the use of the plaintiff

[Particulars]

And the plaintiff claims —

(i) An account

(ii) 194*l*

No 47

✓ AGENT LIABLE TO ACCOUNT—DETINUE.

1 From April 1st, 1899, until August 8th, 1911, the plaintiff employed the defendant as his solicitor and confidential agent in the management of building estates and otherwise.

2 The defendant, as such solicitor and agent, received large sums of money for the plaintiff, for which he refuses to account.

3 The defendant wrongfully detained, and still detains, from

. What is "a debt or liquidated demand in money payable by the defendant"? These words include every "liquidated demand payable in money," although no fixed sum was expressly agreed on at the date of contract (See *Runnacles v Mesquita*, 1 Q. B. D. 416, and *Phillips v Harris*, (1876) W. N. 54.) If no price or remuneration was then fixed, the plaintiff will be paid whatever is regular and usual, according to prices current in the trade, or to some scale of charges recognized in the profession (*quantum meruit*—such sum as he has earned), and the case is still within the rule * (*Lagos v Grunwaldt*, (1910) 1 K. B. 41, 48.) What is excluded from the operation of the rule is an action for unliquidated damages, that is to say, an action in which the amount to be recovered depends upon all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or conjecture. In such cases one cannot say positively beforehand whether the jury will award the plaintiff a farthing, or forty shillings, or a hundred pounds. Merely inserting a figure on the writ (e.g., "and the plaintiff claims 500*l*. damages") will not make such a claim liquidated. But whenever the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained by calculation or fixed by any scale of charges, or other positive data, it is said to be *liquidated* or "made clear," and then the writ can be specially indorsed.

By the express words of clause F, in an action for the recovery of land a claim for rent or mesne profits may be added to the special indorsement. Rent is money payable by a tenant to his landlord for the use and occupation of the premises under a contract, express or implied. Mesne profits are the rents and profits which a trespasser has, or might have, received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profits is always unliquidated. Mesne profits may be claimed from the date of the defendant's entry on the

* See Precedents of special indorsements in R. S. C., Appendix C, Sect. IV. By "R. S. C., Appendix A," or "B," or "C," is meant one or other of the Appendices of Precedents of Writs, Notices, or Pleadings, which are attached to the rules of the Supreme Court of November, 1883. By "Precedent, No. —," I refer to the Appendix of Precedents at the end of this book.

IV.—A SPECIAL INDORSEMENT

A plaintiff can only* indorse his writ specially in one or other of the six cases provided by Order III r. 6, viz. where he seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising —

- (A) Upon a contract express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt)
- (B) On a bond or contract under seal for payment of a liquidated amount of money
- (C) On a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, other than a penalty
- (D) On a guaranty, whether under seal or not, where the claim against the principal debtor is in respect of a debt or liquidated demand only
- (E) On a trust
- (F) In actions for the recovery of land (with or without a claim for rent or mesne profits) by a landlord against a tenant whose term has expired or has been duly determined by a notice to quit, *or has become liable to forfeiture for non-payment of rent,*† or against persons claiming under such tenant. (See Precedents, Nos. 32—39, 72.)

* I do not see why a plaintiff should not be allowed to indorse his writ with a Statement of Claim, whenever he thinks fit. But that is not the law.

† The words in italics were inserted by the R. S. C., January, 1902; and at the same time Order XIV. r. 10 was added

premises till possession is obtained by the plaintiff (*Southport Tramways Co v Gandy*, (1897) 2 Q. B. 66)

Illustrations.

Where the price of a ship is made payable by instalments each instalment as it becomes due is a "liquidated demand in money" within the meaning of Order III r 6

Workman, Clark & Co., Ltd v. Lloyd Brazleño, (1908) 1 K. B. 968, 77 L. J. K. B. 953, 99 L. T. 477.

A solicitor's bill is within the rule, although it is subject to taxation.

Smith v. Edwardes, 22 Q. B. D. 10, 58 L. J. Q. B. 227; 37 W. R. 112; 60 L. T. 10.

Shortal v. Farrell, Ir. R. 3 C. L. 506

Lumley v. Brooks 41 Ch. D. 323, 58 L. J. Ch. 494, 37 W. R. 454, 61 L. T. 172

A writ may be specially indorsed with a claim for arrears of rent, but not for damages for breach of a covenant to repair.

Lloyd v. Byrne, 22 L. R. Ir. 269

Clarke v. Berger, 36 W. R. 809.

Damages for wrongful dismissal are unliquidated; because the plaintiff may have obtained a better situation within a week of his dismissal.

And see *Knight v. Abbott*, 10 Q. B. D. 11; 52 L. J. Q. B. 131, 31 W. R. 505, 49 L. T. 94.

If A agrees to complete certain work for B. by a specified date or in default to pay 5l. per week "as liquidated damages" till the work is completed, then, if this payment is in fact liquidated damages and not a penalty, it can be claimed on a specially indorsed writ.

Toomey v. Murphy, (1897) 2 Ir. R. 601.

The writ may be specially indorsed in an action brought on any foreign or colonial judgment, which in that foreign country or colony finally and conclusively establishes the existence of a debt between the parties

Grant v. Easton, 13 Q. B. D. 302, 53 L. J. Q. B. 68; 32 W. R. 239, 49 L. T. 645

Nouvion v. Freeman, 15 App. Cas. 1; 59 L. J. Ch. 337; 38 W. R. 581, 62 L. T. 189.

A claim against the separate estate of a married woman may be specially indorsed.

Scott v. Morley, 20 Q. B. D. 120; 57 L. J. Q. B. 43; 36 W. R. 67; 57 L. T. 919.

Downe v. Fletcher and Wife, 21 Q. B. D. 11; 36 W. R. 694, 59 L. T. 180

A claim on a bond under the statute 4 & 5 Anne, c. 16, s. 12, is within

the rule (see Precedent, No. 48), a claim on any other bond is not. (As to this distinction between bonds, see *post*, p. 207.)

Tutcher v. Caralampi, 21 Q. B. D. 414; 37 W. R. 94, 59 L. T. 141.

Gerard v. Clowes, (1892) 2 Q. B. 11, 61 L. J. Q. B. 487, 67 L. T. 204

Strickland v. Williams, (1899) 1 Q. B. 382; 68 L. J. Q. B. 241, 80 L. T. 4.

Clause (F) of Order III r. 6, is only intended to apply to clear and simple cases, *e.g.*, where there is no dispute as to the existence of the relation of landlord and tenant between the parties, because the plaintiff and defendant are the original lessor and lessee, or because the defendant has paid rent to the plaintiff, or has otherwise estopped himself from denying the plaintiff's title. (*Casey v. Hellyer*, 17 Q. B. D. 97; *Jones v. Stone*, (1894) A. C. 122.) And see Precedents, Nos. 37, 38, 39, and 72.

Illustrations.

A claim by a landlord to recover possession of the demised premises on the ground that the tenant has committed a forfeiture is not within Order III. r. 6, except in one case—that of a forfeiture for non-payment of rent

Burns v. Walford, (1884) W. N. 31

Arden v. Boyce, (1894) 1 Q. B. 796; 63 L. J. Q. B. 338, 42 W. R. 354, 70 L. T. 480.

A mortgagor, who by the terms of the mortgage deed attorns tenant to the mortgagee, is a tenant within Order III r. 6 (F), so is a tenant at will; and judgment can be signed against either under Order XIV., if the tenancy has been duly determined.

Kemp v. Lester, (1896) 2 Q. B. 162, 65 L. J. Q. B. 532; 44 W. R. 453; 74 L. T. 268.

Palldington v. Power, (1910) 2 Lr. R. 194.

And see *Hall v. Comfort*, 18 Q. B. D. 11, 56 L. J. Q. B. 185.

The advantage of having a writ specially indorsed is ^v fourfold:

- (1.) If the defendant does not appear to the writ, the plaintiff can at once, without any leave, sign final

judgment for the full amount claimed, on filing an affidavit that the writ was properly served.

- (2.) If the defendant does appear to the writ, the plaintiff can take out a summons under Order XIV, and if the defendant fails to show that he has any defence, the Master will give the plaintiff leave to sign final judgment; if the defendant shows only a very weak or shadowy defence, the Master may order him to pay a sum of money into Court within so many days, otherwise judgment to be signed against him for that sum (See *post*, p 56)
- (3.) By specially indorsing his writ, the plaintiff delivers a pleading without the necessity of obtaining leave from a Master (See *post*, pp 77, 78.)
- (4) The plaintiff need not take out any summons at all, either under Order XIV. or Order XXX.; the defendant then must plead to the special indorsement within ten days from the time limited for his appearance. No further Statement of Claim need or can be delivered (except by way of amendment under Order XX. r. 1).

Hence a plaintiff should, as a rule, specially indorse his writ whenever he can

Order XIV. only applies where the defendant has appeared to a writ specially indorsed with a claim under Order III. r. 6, that is, in actions "where the plaintiff seeks *only* to recover a debt or liquidated demand in money," &c. Hence, strictly, no cause of action should be included in a special indorsement, unless it falls under one or other of the six heads set out on p. 42. Still, if a claim not within Order III. r. 6, be included in a writ otherwise specially indorsed, the Master may now, "if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in

the indorsement, and allow the action to proceed as respects the residue of the claim " (Order XIV r 1 (b).)

Illustrations.

In the following cases the writ was held not to be specially indorsed because the plaintiff had included in it a claim which was not within Order III r. 6

Where the plaintiff asked for—

- (a) money due under a mortgage and foreclosure
Hill v Sidebottom, 47 L. T. 224.
- (b) payment of a liquidated sum and an injunction.
Yeatman v. Snow, 28 W. R. 574, 42 L. T. 502.
- (c) payment of debt and interest, foreclosure or sale and a receiver.
Imbert-Terry v Carver, 34 Ch. D. 506, 56 L. J. Ch. 716, 35 W. R. 328, 56 L. T. 91.
- (d) rent and a claim for use and occupation.
Gurney v. Small, (1891) 2 Q. B. 584, 60 L. J. Q. B. 774, 65 L. T. 754.
- (e) rent and a claim for dilapidations.
Clarke v. Berger, 36 W. R. 809.
- (f) price of goods sold and delivered, and a claim for interest under the statute 3 & 4 Will. IV. c. 42, s. 28. (See *post*, p. 53)
Sheba Gold Mining Co v. Trubshawe, (1892) 1 Q. B. 677, 61 L. J. Q. B. 219, 40 W. R. 381, 66 L. T. 228.
Wilks v. Wood, (1892) 1 Q. B. 684, 61 L. J. Q. B. 516; 40 W. R. 418, 66 L. T. 320.
- (g) money paid by the plaintiff to the use of the defendant, and a claim for interest from the time of the plaintiff's payment till payment or judgment.
Ryley v. Master, (1892) 1 Q. B. 674, 61 L. J. Q. B. 219, 40 W. R. 381, 66 L. T. 228.
- (h) money lent, and a similar claim for interest
Paxton v. Baird, (1893) 1 Q. B. 139; 62 L. J. Q. B. 176; 41 W. R. 88; 67 L. T. 623.

A special indorsement is a Statement of Claim, and should be so headed. It should be signed by the counsel or solicitor who drafted it. (*Cassidy & Co. v. M'Aloon*, 32 L. R. Ir. 368.) It must contain full particulars with dates and items sufficient to inform the defendant specifically what is the claim

that is made against him, so that he may be able to make up his mind whether he will pay or fight (*Smith v. Wilson*, 5 C. P. D 25; *Bickers v Speight*, 22 Q. B. D 7) It must also state all material facts necessary to constitute a complete cause of action The more concisely such material facts are stated the better. "But, if a man employs the machinery of the specially indorsed writ, he must make his indorsement a full and complete statement of his cause of action" (*Per Lord Coleridge*, C. J , in *Fruhauf v. Grosvenor & Co* , 67 L. T. at p. 351.)

This, it is submitted, is clear law, although there are two cases reported in which the Court laid down a less strict rule In both the objection taken to the indorsement was of a purely technical character In *Satchwell v. Clarke*, 66 L. T. 641, the Court of Appeal decided that where the plaintiff's claim was for a certain sum for principal and interest due to him as the assignee of a mortgage debt due from the defendant, the writ was specially indorsed, although it did not state that express notice in writing of the assignment had been given to the defendant. After the defendant had appeared, and before taking out a summons under Order XIV., the plaintiff amended his writ by adding a distinct averment that the defendant had express notice in writing of the assignment But such an amendment, as the law then stood, came too late. (See *Gurney v. Small*, (1891) 2 Q. B 584.) Hence, in order to do substantial justice, the Court had to decide that the original indorsement was good without the amendment. And undoubtedly, Fry and Lopes, L JJ., were inclined to hold that it was not "necessary, in order to make the writ a specially indorsed writ, to have everything set out in the indorsement that is requisite in a Statement of Claim." This was, however, decided before *Fruhauf v Grosvenor & Co* After that case a somewhat similar point came before a Divisional Court in *Bradley v. Chamberlyn*, (1893) 1 Q B 439. There the only fault that could be found with the indorsement was, that it did not contain an express averment of the due performance of a condition precedent This would not be necessary in a Statement of Claim delivered separately. By the express words of Order XIX. r 14,

"An averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading," and therefore in his special indorsement, which is a pleading. But this rule was never cited to the Court, nor were the decisions in *Anlaby v Prætorius*, nor *Cassidy & Co v. M'Aloon*. The defendant had filed no affidavit of merits, but relied merely on this technical point, which the Court rightly overruled, but, unfortunately, on the ground that "a writ may be specially indorsed, although it does not contain an averment which would be material in a Statement of Claim"—a ground which is certainly inconsistent with the prior decisions that a special indorsement is a Statement of Claim.

Illustrations.

"Where the writ is specially indorsed under Order III. r 6, no further Statement of Claim shall be delivered [except as an Amended Statement of Claim], but the indorsement on the writ shall be deemed to be the Statement of Claim."

Order XX. r. 1 (a).

"The writ specially indorsed under Order III r 6, is a Statement of Claim."

Per Lopes, L J, in *Anlaby v Prætorius*, 20 Q. B. D at p 770; 57 L. J. Q. B. 287, 36 W. R. 487, 58 L. T. 671.

In order to enable a plaintiff to obtain summary judgment under Order XIV, his writ must be specially indorsed with a "Statement of Claim," so headed, and signed at the foot by the person who drafted it. Such heading and signature are valuable as the only distinct indications from which the defendant can learn that he is served, not only with a writ of summons to which he must appear, but also "with a Statement of Claim to which he must plead."

Cassidy & Co. v. M'Aloon, 32 L. R. Ir. 368.

The indorsement must expressly state the contract on which the plaintiff sues, and show that the defendant is liable thereunder.

Seaton v. Clarke and others, 28 L. R. Ir. 514.

It is of no avail to set out such contract in an affidavit under Order XIV. if it is not stated in the indorsement.

Gold Ores Co., Ltd. v. Parr, (1892) 2 Q. B. 14; 61 L. J. Q. B. 522.

But it will be sufficient if facts be alleged on the writ from which the contract sued on can be properly inferred.

Mère Dositbée v. Paget Palmer, 27 L. J. Notes of Cases, 24.

"The plaintiff's claim is for £——, balance of account for goods sold," is not a good special indorsement, because no dates are given.

Panter v. Wallis, Times for November 5th, 1878, overruling Lush, J., in *Anon.*, (1875) W N, at p. 220.

Phelan v. Shanks, 18 Ir L T. 13

Parpaite Frères v. Dickinson, 26 W. R. 479, 38 L.T. 178

But this defect will be cured if the indorsement refers to some account already rendered which contains the necessary particulars.

Aston v. Hurwitz, 41 L. T. 521.

The defendant is entitled to know how the balance claimed is arrived at.

Manchester Advance, &c Bank v. Walton, 62 L. J. Q. B. 158; 68 L T. 167.

A claim for rent must state the dates at which the rent claimed fell due.

Beaufort v. Ledwith, (1894) 2 Ir. R. 16.

In any action on a bill of exchange, promissory note, or cheque, full particulars of the amount and date of the negotiable instrument, and of the parties thereto, must be given on the writ.

Walker v. Hicks, 3 Q. B. D. 8, 47 L J Q. B. 27, 26 W. R. 113; 37 L T 529

Merely setting out a true copy of the cheque sued on, without more, is not a sufficient indorsement.

Northern Banking Co. v. Bailey, (1894) 2 Ir. R. 18

In an action brought against the drawer of a dishonoured cheque, the indorsement on the writ must contain either an allegation that notice of dishonour was given to the drawer, or a statement of the facts excusing the giving of such notice.

Fruhauf v. Grosvenor & Co, 61 L J Q. B. 717, 67 L. T. 350; 8 Times L R 744.

May v. Childley, (1894) 1 Q. B. 451, 63 L. J. Q. B. 355; 10 R. 423

Roberts v. Plant, (1895) 1 Q. B. 597; 64 L. J. Q. B. 347; 43 W. R. 308, 72 L T. 181.

Where a writ is specially indorsed with a claim for the purchase-money of land sold by the plaintiff to the defendant, the indorsement must allege that the defendant had accepted the title

Leader v. Tod-Heatly, (1891) W N. 38

But a special indorsement need not contain an averment that a condition precedent has been duly performed.

Order XIX. r. 14.

Bradley v. Chamberlyn, (1893) 1 Q. B. 439; 41 W. R. 300; 68 L. T. 413

In an action for the recovery of land by a landlord against tenants whose term had expired, the writ was indorsed under Order III. r. 6 (F).

The date of the lease and the mode of devolution of the lessee's interest on the defendants were duly stated, but not the length of the term. *Held*, a good special indorsement, for it gave the defendants sufficient information

Hanmer v Clifton and others, (1894) 1 Q B 238; 42 W R. 287,
10 R. 55

Claim of Interest on a Specially Indorsed Writ

A claim for interest may be included in a special indorsement, provided facts be also alleged which entitle the plaintiff to such interest. There are four distinct cases to which different considerations apply

1. In the case of a bill of exchange, promissory note, cheque, or any other negotiable instrument to which the Bills of Exchange Act, 1882, applies, interest may be claimed not only up to date of writ, but also till payment or judgment. And the expenses of noting and protesting the bill may also be claimed on a specially indorsed writ. The Act expressly declares that such claims for interest and expenses are to be "deemed to be liquidated damages" (See *London and Universal Bank v. Clancarty*, (1892) 1 Q B 689; *Dando v Boden*, (1893) 1 Q B 318; and Precedent, No 32)

2. In the case of a common money bond conditioned for the repayment of half the amount with interest (see *post*, p 207), the plaintiff may specially indorse his writ and obtain judgment under Order XIV. for half the amount named on the face of the bond, with interest thereon up to date of judgment. For at law the plaintiff was formerly entitled to the full amount, which is clearly "a liquidated demand"; the reduction is a relief accorded to the defendant, only on equitable terms, which would include the payment of all interest at a fair percentage. (*Gerrard v Clowes*, (1892) 2 Q B 11, *Strickland v Williams*, (1899) 1 Q. B 382; *In re Dixon*, (1900) 2 Ch. 561 See Precedent, No 48)

3. Interest may also be payable by agreement, express or

implied, or it may be fixed by some statute. In such cases the agreement to pay interest at the rate claimed, or the facts from which such an agreement can be implied, or the facts which bring the case within such statute, must be sufficiently alleged on the writ (not merely in the affidavits), and then interest at the rate agreed or fixed, may clearly be claimed up to date of writ. But not, I think, "till payment or judgment." In the absence of any express enactment enabling him so to do, a plaintiff has no right to indorse his writ with any claim that has not at that moment arisen.

It must not be assumed that wherever a claim for interest up to the date of the writ may properly be included in a special indorsement, a claim for accruing interest until payment or judgment at an ordinary rate may also be added. The case of a negotiable instrument is governed by a special statute. The Court, in *London and Universal Bank v. Clancarty*, found in sub-sect (2) of sect. 57 of the Bills of Exchange Act, 1882, the words "with interest thereon until the time of payment," and they read these words into sub-sect (1). (See (1892) 1 Q. B. at p. 695.) Therefore, in any case to which that Act applies, it is safe to claim interest till payment or judgment. But whenever the action is not brought on a negotiable instrument within that Act, the plaintiff is bound by the ruling in *Sheba Gold Mining Co. v. Trubshawe*, (1892) 1 Q. B. at p. 682 — "A man who is to be proceeded against summarily for judgment should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation."

And there is really no hardship in this. If the defendant does not appear, the plaintiff may, by the express words of Order XIII r. 3, "enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five per cent per annum, to the date of the judgment, and costs." If the defendant appears, the plaintiff can apply, under Order XIV, "for liberty to enter final judgment for the amount so indorsed, together with interest, if any." This clearly means interest to date of judgment, when interest to date of writ is already indorsed.

Should leave be given to the defendant to defend the action, the plaintiff, if successful, must apply to the judge at the trial for interest from date of writ to judgment (See *Earl Poulett v Viscount Hill*, (1893) 1 Ch 277) From the date of the judgment he will be entitled to interest at the rate of four per cent on the amount of the judgment and costs, under the statute 1 & 2 Vict c 110, s 17

4 In any other case, if interest can be recovered at all, it must be under the statute 3 & 4 Will IV c 42, ss 28, 29, which enables a jury, in certain cases, "if they shall think fit," to award interest as damages A judge now has the same power (*L C & D Rail. Co v S E Rail Co*, (1892) 1 Ch. at p. 146.) Such a claim cannot be specially indorsed, it is clearly unliquidated, the jury fix the rate of interest, indeed they are not bound to give any interest at all (See *post*, p. 394) If the plaintiff hopes to obtain judgment under Order XIV., he should omit all reference to such a claim on his writ, but apply for leave to add it on the hearing of the summons in case the Master should decide to give the defendant leave to defend. Such a claim on a writ is not a demand within the statute. (*Rhymney Rail Co v. Rhymney Iron Co.*, 25 Q B D. 146, *Wilks v Wood*, (1892) 1 Q. B. at p. 687)

CHAPTER IV

PROCEDURE UNDER (ORDER XIV)

WHENEVER a writ is properly indorsed under Order III r 6 (*ante*, p 42), and the plaintiff can show to the satisfaction of a Master or a judge that he has a cause of action which the defendant cannot answer, leave will be given him to "sign judgment at once without going through all the unnecessary and expensive preliminaries to a trial or the expense of the trial itself. It is a strong thing to give such a power to a judge, and this Court and all the Courts have said, therefore, that they would watch strictly the exercise of that power. But they did not mean by that that they would give effect to every pettifogging objection which the ingenuity of a defendant could raise" (*Per Lord Esher, M R, in Roberts v Plant*, 14 R at pp 225, 226)

It is only when his writ is specially indorsed under Order III. r. 6, that a plaintiff can ask for summary judgment. And there are many cases in which he should not ask for it, although his writ is specially indorsed. He is not bound to take out either a summons for judgment under Order XIV or a summons for directions. He can take out either or neither at his pleasure. He should remember that Order XIV. is only intended to apply to cases where there is no substantial dispute as to the facts or the law. If he applies for summary judgment where there is an obvious defence to the action, his summons may be dismissed with costs.

The procedure under Order XIV. is as follows.—

Either the plaintiff himself or some other person who can swear positively to the facts must make an affidavit, verifying the cause of action and the amount claimed (if any), and

stating that in his belief there is no defence to the action. If the affidavit is sworn by a person other than the plaintiff, he should state his means of knowledge, and also that he is authorised to make the affidavit (*Chigwin v Russell* (1910), 27 Times L R 21). It is sufficient if the affidavit verify the cause of action in general terms and by reference to the indorsement. It need not explicitly repeat every allegation made on the writ (*May v Chadley*, (1894) 1 Q B 451.). Armed with this affidavit, the plaintiff takes out a summons before a Master at Chambers for leave to enter final judgment for the amount indorsed on his writ, together with interest, if any, or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The summons is usually in the form given in Precedent, No 41. The affidavit must be produced when the summons is issued. The summons must be served on the defendant or his solicitor not less than four clear days before the day named in it for the hearing. And with the summons must be served a copy of the affidavit and of the exhibits referred to therein. The application may be made even after delivery of a Defence, but the plaintiff will have to explain the delay (*McLardy v Slateum*, 24 Q B D. 504).

The defendant may show cause against the application by affidavit; or (except in actions for the recovery of land) he may offer to bring into Court the sum indorsed on the writ. His affidavit must state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff's claim. The Master may, if he thinks fit, order the defendant, or in the case of a corporation, any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom (Order XIV. r 3).

On the hearing of the application the Master has three courses open to him. He may give leave to defend *uncon-*

ditionally. And he ought to do so whenever there is an issue to be tried, even though he may think the defendant will fail (*Jacobs v Booth's Distillery Co*, 50 W R 49, 85 L. T 262, *Wells v. Allott*, (1904) 2 K B. 842, *Codd v. Delap*, 92 L T 510 (H. L.), *Dott v Bonnard*, 21 Times L. R. 166.) If, however, no real defence is shewn by the defendant, the Master may give him only *conditional* leave to defend—that is, subject to such terms as to paying money into Court, giving security, or time or mode of trial, or otherwise, as he may think fit (r. 6) But if the facts alleged by the defendant on his affidavit, or by his own *vivâ voce* evidence, or otherwise, do not amount to a defence to the action, either in fact or law, the Master will, as a rule, make an order giving the plaintiff leave to enter judgment for the amount indorsed on his writ—in a proper case, with interest (Order XIV. r. 1) Such an order places the plaintiff in the position of a secured creditor. (*In re Ford*, (1900) 2 Q B 211) And as soon as he enters judgment in pursuance of the leave thus given him, he becomes a judgment creditor (*In re Gurney*, (1896) 2 Ch. 863.)

Defendant's Affidavit

The defendant is not bound in his affidavit to show a good defence on the merits Rule 1 clearly contemplates that other facts “may be deemed sufficient to entitle him to defend.” “If, therefore, the defendant shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him . . . and leave to defend may be granted either unconditionally or upon such terms as may be thought just” (*Per Brett, L J*, in *Ray v Barker*, 4 Ex. D. at p 283.) Where a defence of a kind is set up by the defendant, but the Master mistrusts its *bona fides*, he will generally order the defendant to bring money into Court. But whenever a genuine defence, either in fact or law, sufficiently appears, the defendant is entitled to unconditional leave

to defend (*Ward v Plumbley*, 6 Times L R 198, *Electric Corporation v. Thomson-Houston*, 10 Times L R 103) For the form of these various orders see Precedent, No 42

The defence must be stated with sufficient particularity to at least appear to be genuine A general statement, "I do not owe the money," or a vague suggestion of fraud or other misconduct, will not suffice "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice" (*Wallingford v Mutual Society*, 5 App Cas at p 697, and see pp 701, 704) A technical defence, such as the Statute of Limitations, is sufficient But it must be a defence An affidavit merely pleading poverty, or showing hardship, or a remedy over against a third person, will not avail Where the plaintiff claims interest at an exorbitant rate, but his demand is in other respects unanswerable, the defendant will be ordered to bring into Court the sum advanced and interest at the rate of 5 per cent, and allowed to defend as to the residue (*Parlcer v Brand*, 7 Times L R 462.) Where the defendant has no defence, but a good counterclaim for a larger amount than the claim, the plaintiff is entitled to have judgment on his claim, but execution will be stayed until after the trial of the counterclaim (*Sheppards & Co v Wilkinson*, (C A) 6 Times L. R. 13)

The defendant often relies on the technical defence that the writ is not properly indorsed. For Order XIV. only applies where the writ is specially indorsed in accordance with Order III. r. 6; and that rule is limited to "actions where the plaintiff seeks *only* to recover a debt or liquidated demand in money." Hence the indorsement may be defective in two ways:—

- (i.) A portion of the plaintiff's claim may be in its nature unliquidated, and, therefore, incapable of being specially indorsed.
- (ii.) The whole of the plaintiff's claim may be liquidated, and of such a nature that it could have been specially indorsed; and yet the indorsement may be defective through the omission to state necessary details—*e.g.*,

where the plaintiff sues on a bill of exchange, but accidentally (as in *Walker v Hicks*, ante, p 50) omits to state its date

Both these difficulties can now be surmounted. In the first case the Master may, if he think fit, forthwith amend the indorsement by striking out any claim which could not have been specially indorsed under Order III. r 6, or he may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim (Order XIV. r. 1 (b)) In the second case the plaintiff may himself, without any summons or leave, amend his indorsement under Order XXVIII r. 2, by inserting the necessary particulars; he may do this without taking out any summons for directions. Or he may induce the Master to amend it for him under r. 1 of the same Order, when the summons under Order XIV is before him. In the latter case, there is no need to re-serve the amended writ, or to take out a fresh summons under Order XIV ; the former appearance stands. (*Paxton v. Bard*, (1893) 1 Q. B 139, *Holland v Leslie*, (1894) 2 Q. B. 450 The law is otherwise in Ireland, *Hagh v Purchell*, (1908) 2 Ir. R 56) The Master has jurisdiction to make an order for summary judgment, if there is a good special indorsement on the writ before him at the moment when he makes the order (*Roberts v. Plant*, (1895) 1 Q B. 597.) And whenever on a summons under Order XIV , unconditional leave to defend has been given in consequence of any technical defect in the writ, the plaintiff may, after the defect has been cured, make a second application for final judgment. (*Dombey & Son v Playfair Brothers*, (1897) 1 Q. B 368)

If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff can have judgment forthwith for such part of his claim as the defence does not apply to or

as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs or otherwise, as the Master may think fit, and the defendant may be allowed to defend as to the residue of the plaintiff's claim (Order XIV r 4) If it appears to the Master that any defendant has a good defence to the action, and that any other defendant has no good defence, he may give the former defendant leave to defend, and allow the plaintiff to enter final judgment against the latter, and to issue execution upon such judgment, without prejudice to his right to proceed with his action against the former defendant (r 5). But this rule does not apply where the right of action can only be in the alternative against one or other of two defendants In such a case judgment against one of the defendants is conclusive evidence of an election not to proceed against the other (*Morel Brothers v Earl of Westmorland*, (1904) A. C. 11, *French v Howe*, (1905) 2 K B 580, (1906) 2 K B 674)

Judgment may be entered under Order XIV against a firm, even though one of the partners be an infant (*Harris v Beauchamp* (No 1), (1893) 2 Q. B 534) It may also be obtained against a married woman under this Order, but in this case the judgment must be drawn up in the form prescribed in *Scott v Morley*, 20 Q B. D. 120 (*Downe v Fletcher and Wife*, 21 Q B D. 11, *Axford v Reid*, 22 Q B D 548)

It was in January, 1902, that Order XIV was for the first time made to apply to actions for the recovery of land in which a tenant had forfeited his lease through non-payment of rent But it was at the same time expressly provided (r 10) that such a tenant should "have the same right to relief after a judgment under this Order as if the judgment had been given after trial," that is, he will have the right to apply within six months to have the judgment set aside on payment of all rent in arrear and costs, under sect 210 of the Common Law Procedure Act, 1852

The Master may, with the consent of the parties, himself then and there dispose of the action finally and without appeal (r 7)!

Or with the like consent he may make an order referring the action to a Master, in which case an appeal lies from the decision of that Master to a Divisional Court (*Fraser v Fraser*, (1905) 1 K. B. 368)

Where leave, whether conditional or unconditional, is given to defend, the Master has power to give all such directions as to the further conduct of the action as can be given on a summons for directions under Order XXX. (See *post*, p. 68) He may order the action to be set down for trial without further pleadings, and, if he is of opinion that a prolonged trial will not be requisite, he may direct that it shall be entered in the special list which is kept of short causes in which leave to defend has been given under this Order, and be tried either with or without a jury. He may not however restrict the defences which the defendant may raise at the trial. (*Langton v Roberts*, 10 Times L. R. 492) Nor will the defendant at the trial be restricted to the defences disclosed in his affidavit. The Master usually directs that the short cause be tried without a jury, but he may order it to be tried by either a special or a common jury. (Order LIV r. 32, *Woolf v De Braam*, 48 W. R. 161)

The costs of and incident to all applications under Order XIV. will be dealt with by the Master on the hearing of the application; he may order by and to whom and when the same shall be paid, or may refer them to the judge at the trial. If no trial afterwards takes place, or no order as to costs is made, the costs will be costs in the cause. (See *post*, p. 363) And in order to discourage plaintiffs from making unnecessary applications for summary judgment, it is provided that if a plaintiff makes an application under this Order, where the case is not within the Order, or if the plaintiff in the opinion of the Master knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application shall be dismissed with costs, to be paid forthwith by the plaintiff (r. 9 (b)).

CHAPTER V

PROCEEDING TO TRIAL WITHOUT PLEADINGS.

(Order XVIII A.)

IN November, 1893, for the first time in the history of our law, power was given to a plaintiff to dispense with pleadings, if he thought fit. And some plaintiffs, anxious for speedy judgment, have been glad to avail themselves of this provision. But it often is unwise to dispense with pleadings, even though the plaintiff be in a hurry to obtain judgment, for by so doing he loses the opportunity of obtaining an outline of the defendant's case, and of ascertaining how much of his own case his opponent is prepared to admit. Hence, on the whole, the experiment has proved a failure; and, having regard to the stringent powers given to the Master in 1897 by the amendment of Order XXX., Order XVIII A. might now with advantage be repealed.

However, it is still open to a plaintiff to dispense with pleadings if he has sufficient confidence in his case to do so, in spite of the considerations urged above. The procedure is regulated by Order XVIII A.

1. In the first place, it is essential that the plaintiff should make on his writ an indorsement which "shall contain a statement sufficient to give notice of the nature of his claim, or of the relief or remedy required in the action, and shall state that, if the defendant appears, the plaintiff intends to proceed to trial without pleadings" (See Precedents, Nos 9—28)

2 To the writ so indorsed, the defendant appears in the ordinary way. No summons for directions is necessary;

though either party *can* take one out if he wishes (Order XXX. r. 1 (d)). The plaintiff, within ten days after appearance, gives twenty-one days' notice of trial without pleadings. This notice should be in the following form, with such variations as circumstances may require

R. S. C., APPENDIX B., FORM No. 16A

Notice of Trial without Pleadings

Take notice of trial of this cause without pleadings in Leicester (*or, as the case may be*) for the ——— day of ——— next.

X. Y., plaintiff's solicitor (*or as the case may be*)

Dated ———

To Z, defendant's solicitor (*or, as the case may be*).

3. The defendant, however, may wish to have pleadings delivered. He can no longer claim this as a right. But he may, within ten days after appearance, apply by summons for the delivery of a Statement of Claim. On such summons the Master may make any order which he would have power to make on a summons for directions under Order XXX r. 1. In particular, he may order (1) that a Statement of Claim shall be delivered, in which case the action will proceed in the usual manner, or (2), that the action shall proceed to trial without pleadings, in which case it may be further ordered, if the Master shall think fit, that either party shall deliver particulars of his claim or defence.

Note that the power given by this rule to apply for delivery of pleadings is conferred only on the defendant. The plaintiff's election to proceed to trial without pleadings signified in the indorsement on his writ is irrevocable; see rule 6 on next page

4. When the Master orders that the action shall proceed to trial without pleadings, and makes no order as to particulars, all defences will be open at the trial to the defendant. Where particulars are ordered to be delivered, the parties will be

bound by such particulars, on all matters included in the order for particulars.

. Hence, a defendant should always ask for particulars of the special damage, if any, sustained by the plaintiff, as the plaintiff is not bound to state such damage in an indorsement on a writ. And if any plaintiff has ventured to dispense with pleadings in an action of libel or slander, he should, on the defendant's summons, ask for particulars of the facts, if any, on which the defendant proposes to rely at the trial to prove the truth of his words.

5. Where a defendant has not taken out a summons under rule 3 of this Order, he will not be allowed to rely at the trial on a set-off or counter-claim, or on the defence of infancy, coverture, fraud, Statute of Limitations, or discharge under the Bankruptcy Acts, unless he shall have given (within ten days after appearance) notice to the plaintiff, stating the grounds and particulars upon which he relies.

The time for delivering such a notice may be enlarged by consent or by leave under Order LXIV rr 7 and 8. Precedents of the notices required will be found in the Appendix, Nos 103—108.

6. When a plaintiff indorses the writ of summons with a statement that, if the defendant appears, he intends to proceed to trial without pleadings, no pleadings shall be required or delivered, except by Order of the Master made under rule 3 of this Order.

There is one exception to this rule. If the defendant does not appear and the action is not for debt, damages, detinue, or the recovery of land, the plaintiff is bound to proceed under Order XIII r 12 (*ante*, p. 6). He must therefore file a Statement of Claim, although, had the defendant appeared, there would have been no pleadings. (*Greene v St. John's Mansions, Limited*, (1900) W N 9)

Under the former procedure, it was possible, though very unusual, for an action to go to trial without pleadings. By r. 9 of Order XXXIV, when the parties to a cause or matter are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent obtain an order from a Master to proceed to the trial of all or any such questions of fact without formal pleadings, and such questions may be stated for trial in what is technically called "an issue." The form of an issue given in R. S. C., Appendix B, No. 15, may be used, with such variations as circumstances may require. And such issue may be entered for trial and tried in the same manner as any issue joined in an ordinary action, and the proceedings shall be under the control and jurisdiction of the Court or judge, in the same way as the proceedings in an action.

So, too, "the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court." (Order XXXIV. r. 1; and see r. 2 of the same Order.) But it is, generally, difficult to induce the parties to concur in any reasonable course, and special cases now are rare. Then, again, the Court or a judge, on any question of fact, may direct an issue to be prepared. (See Order XXXIII. rr. 1, 2.) Such issues take the place of pleadings; they are usually directed to determine whether a particular person was or was not a member of the defendant firm at the time the contract sued on was entered into with that firm, or to determine the liability of a person summoned as a garnishee (see p. 344), or to decide between rival claimants to property taken in execution by the sheriff or in the hands of a stakeholder (see p. 341), but they are of little use when the main questions in an action have to be decided.

CHAPTER VI

SUMMONS FOR DIRECTIONS.

WE have already dealt with those actions in which the plaintiff has specially indorsed his writ under Order III r 6. We have also described the procedure when the plaintiff has indorsed his writ for trial without pleadings. To neither of these classes of actions does Order XXX. apply. Nor does it apply to Admiralty actions*. But with these three exceptions, in every action commenced by writ, Order XXX. applies as soon as any defendant has entered an appearance (not till then), and the plaintiff is bound promptly to take out a "summons for directions" And because the plaintiff must, the defendant may not, take out this summons. In the three excepted classes of actions either party may, if he wishes, take out a summons for directions, but neither party is bound to do so.

On a summons for directions, the Master decides how the action is to be conducted from appearance till judgment. He can make such order as may be just with respect to all the proceedings in the action up to judgment (*Brown v. Haig*, (1905) 2 Ch. 379), and as to the costs thereof. His jurisdiction is not limited to the matters more particularly enumerated in Order XXX. r. 2. (*Pepperell v Hird*, (1902) 1 Ch 477.) The summons must be taken out "after appearance and before the plaintiff takes any fresh step in the action other

* Admiralty actions have in other respects a procedure of their own See Order XIII. r. 12A, Order XIX. r. 28; Order XX. r. 3, and Order XXVII. r. 11A.

the plaintiff the plaintiff's deeds, books, account-books, papers and writings.

The plaintiff claims—

- 1 An account of all sums received and paid by the defendant as solicitor and agent of the plaintiff
- 2 Payment of the amount found due to the plaintiff on taking such account
- 3 A return of the said deeds, books, account-books, papers and writings
- 4 Damages for their detention

No 48

✓ ACTION ON A BOND AGAINST THE EXECUTOR AND DEVISEE OF
THE OBLIGOR

(Under 11 Geo IV & 1 Will IV c 47, s 2, see p 18.)

1 William Brown, by his bond dated April 16th, 1906, bound himself and his heirs to pay the plaintiff the penal sum of 1,000*l*, subject to the condition that if he or they paid the plaintiff the sum of 500*l* on April 16th, 1907, with interest thereon at the rate of 5 per centum per annum, the said bond should be void

2 On April 16th, 1907, William Brown paid the plaintiff 25*l*, being interest on 500*l* at the agreed rate for one year, he paid the plaintiff the like sum on April 16th, 1908 He made no other payment to the plaintiff

3 On February 21st, 1909, William Brown died.

4 The defendant, George Brown, is the eldest son and executor of William Brown The defendant, Mary Brown, is his widow, to whom, by his last will, dated February 9th, 1908, he devised all his real estate

And the plaintiff claims against the defendants jointly—

	£	s	d
Principal	.	.	500 0 0
Interest from April 16th, 1908, to date of writ	.	.	79 3 4
			<hr/>
Amount due	.	.	£579 3 4

thinks right, though neither party has asked for them. However, on the first hearing of the summons it is not possible to think of everything that may prove necessary at a later stage of the proceedings. For instance, the plaintiff cannot be sure that interrogatories will be necessary till he has seen the Defence. Hence it is provided that application for such later directions may be made subsequently by either party. But it is made on the original summons, without any fresh stamp. The party who desires further directions must give two clear days' notice to the other party stating what it is he wants, and reinstate the summons for directions in the Master's list for the day named in the notice. But note that if on any subsequent hearing of the summons either party asks for and obtains directions which he ought properly to have asked for on the first hearing, he may be ordered to pay the costs of the subsequent application. (Order XXX. rr 3—6.)

Summons by the Defendant.

In any action, not an Admiralty action, in which the writ is generally indorsed, the defendant cannot take out a summons for directions. That is the privilege of the plaintiff alone. Till the plaintiff thinks fit to exercise this privilege, the defendant can take out any other summons he thinks fit (*e.g.*, for time) just as he could before the amendment of Order XXX. made in 1897. He may also pay money into Court. But if the plaintiff does not within fourteen days, from the entry of the defendant's appearance (or, if more than one defendant, from the first appearance entered) take out a summons for directions, the defendant may apply for an order to dismiss the action; and upon such application the Master may either dismiss the action on such terms as may be just, or may deal with the application in all respects as if it were a summons for directions (Order XXX. r. 8.) This

than application for an injunction, or for a receiver, or the entering of judgment in default of Defence under Order XXVII " (Order XXX r 1.) It requires a ten shilling stamp. It must be served on all parties to the action who may be affected by it not less than four days before the day named in it for the hearing. The form of the summons will be found in the Appendix, Precedents Nos. 43 and 45, the form of the order in Precedent No 44. Such variations will of course be made as the circumstances of the particular case may require.

This novel kind of *omnibus* summons was invented in 1883, it was intended to supersede the previous practice, according to which every application at chambers had to be made by a separate summons, each bearing a three shilling stamp. The only application for directions in use before 1883 was in connection with third party procedure (see *post*, p 233). Under the original Order XXX either party might take out the summons when he pleased, and the Master had no power on the hearing of such a summons to dispense with pleadings. The practice however of using separate summonses for each application still continued, until 1897, when the use of this general summons was made compulsory on the plaintiff in most actions, while at the same time in those actions its use by a defendant was prohibited.

On the first application under a summons for directions no affidavit is used, except by special order. The Master accepts the statements of the parties or their solicitors or counsel as to the nature of the action, the proposed line of defence, and the assistance they respectively need to enable them properly to prepare for trial. And it is not only the plaintiff who asks for directions. The plaintiff takes out the summons, but at the hearing any party to whom the summons is addressed must, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire. And the Master may give whatever directions he

rule practically compels the plaintiff to take out a summons for directions within fourteen days after appearance

Matters dealt with on the Summons

There are then four distinct cases in which a Master now has power to give directions as to any proceeding to be taken in the action after appearance —

- (i.) On a summons for directions taken out by a plaintiff under Order XXX. r 1
- (ii.) On a summons to dismiss the action taken out by a defendant under Order XXX. r 8.
- (iii.) On a summons taken out by a plaintiff for leave to sign summary judgment on a specially indorsed writ, where the Master has given the defendant leave, conditionally or unconditionally, to defend the action (Order XIV. r. 8 (a))
- (iv.) On a summons taken out by a defendant for the delivery of a Statement of Claim under Order XVIII A., the plaintiff having indorsed his writ for trial without pleadings (Order XXX. r. 1 (c))

A Master may also order a Statement of Claim or particulars to be filed after interlocutory judgment has been entered in an action for unliquidated damages or for the return of a chattel, and before the damages are assessed (Order XIII r 5)

It may be well to notice further a few of the matters usually dealt with on the various applications made on a summons for directions

Security for Costs —The defendant may in certain cases ask for an order to compel the plaintiff to give security for the costs of the action; *e g* , where the plaintiff resides permanently abroad, and has no substantial property, real or personal, in England. But the mere fact that the plaintiff is insolvent, or is a married woman, is not sufficient ground for such an order

Stay of Proceedings.—Again, on a summons for directions, the Master has power to stay all proceedings, if the action be frivolous and vexatious (see *post*, p. 173) or should have been brought elsewhere (*Logan v Bank of Scotland*, (1906) 1 K. B. 141), or if the plaintiff's mode of conducting the action be oppressive and vexatious (*Norton v Norton*, (1908) 1 Ch 471), or if he has not paid the costs of a previous action brought on the same cause of action. But the mere fact that a plaintiff has not paid costs which he was ordered to pay upon an interlocutory application in the present action, is not a ground for staying proceedings in the action, if the plaintiff really is unable to pay them. (*Graham v. Sutton, Carden & Co* (No. 2), (1897) 2 Ch. 367) The Master will also on this summons dismiss an action for want of prosecution.

Particulars—If any pleading does not give the other party the information to which he is entitled, he may apply for "particulars," that is, a statement in writing supplementing the defective pleading and giving the details omitted from it. Such details ought, of course, to be given in the original pleading (see *post*, pp. 177—188); and the Master generally orders them to be so given when he orders pleadings. (See Precedent, No. 44)

Accounts.—On this summons, too, the Master will order the delivery of an account under Order XV. (see *ante*, p. 40), or for the usual partnership accounts.

Place of Trial.—In every action in every Division the place of trial is now fixed by the Master. (Order XXXVI. r. 1.) It will be determined, as a rule, by considerations of economy and convenience; the Master will fix it in the place which he deems least expensive and most convenient for both parties, and the majority of the witnesses on both sides. The plaintiff has no longer a preponderating voice in the matter; he has no *primâ facie* right to have the trial fixed in the place that best suits himself and his witnesses. Where the defendant resides is

immaterial. Where the cause of action arose has now but little to do with the question. But if either party can satisfy the Master that it would be unfair to fix the trial at the place which seems naturally most convenient, because his opponent is especially popular or powerful in that neighbourhood, or because for any other reason there would not be a fair trial in that place, the Master will fix on some other place where he is sure the jury will be impartial.

The decision of the Master as to the place and mode of trial "may be subsequently altered for sufficient cause" (Order LIV r 32, and see *post*, p 303)

Mode of Trial—The Master has power to direct the mode of trial. But in exercising his discretion in this matter, he will have regard to rules 2—9 of Order XXXVI., which preserve the right of the parties to demand trial by jury in certain cases. See *post*, p 304

Time of Trial—On a summons for directions the Master cannot compel a defendant, who is not in default and is not asking for any indulgence himself, to take short notice of trial (*Laskier v Tekeran*, 67 L. T 121.) But if an action is to be tried at the Assizes he may direct that it shall not be tried before the third, fourth, or fifth day of the Assizes, and order the defendant to accept ten days' notice of trial for the day so fixed (*Baxter v Holdsworth*, (1899) 1 Q. B 266)

Commercial Cases—In these cases, directions are usually given by the judge in charge of the commercial list. He frequently orders that points of claim and defence be delivered instead of pleadings, and that lists of documents be interchanged instead of the usual affidavits of documents. (See Precedents, Nos 45, 60, and 87) Either party may appeal against an order transferring an action to the commercial list on the ground that it is not a commercial cause at all (*Sea Insurance Co v. Carr*, (1901) 1 K B 7.)

Evidence.—It may be necessary to have the evidence of some person abroad taken on commission or under letters of request (see *post*, p. 297), or to have a witness who is dangerously ill or about to go abroad examined here before the trial (see *post*, p. 297), or to obtain a copy of an entry in a banker's book under the Bankers' Books Evidence Act, 1879 (*post*, p. 301), or to order production or inspection of any document under Order XXXI rr 18, 19, 19A. And note, that a very wide power is given to a Master by Order XXX. r 7 to dispense with the strict rules of evidence in a proper case. On the hearing of a summons for directions the Master may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise, as he may direct. It is unfortunate that this important power is so little used. On this summons also the Master deals with all questions as to interrogatories and discovery of documents.

Pleadings - -But the most important question that comes before the Master on a summons for directions is usually: "Shall there or shall there not be pleadings?" Order XXX. has no application till the defendant has entered an appearance. But after appearance the plaintiff cannot deliver a Statement of Claim without the order of a Master; and after a summons for directions has been taken out, the defendant cannot deliver a Defence without the order of a Master.

What, then, is the use, what is the function, of pleadings, and when will the Master order pleadings to be delivered?

These questions will be answered in the next chapter.

CHAPTER VII.

PLEADINGS.

The Function of Pleadings.

BEFORE judge and jury are asked to decide any question which is in controversy between litigants, it is in all cases desirable, and in most cases necessary, that the matter to be submitted to them for decision should be clearly ascertained. The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross-claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what they are fighting about, otherwise they may go to great expense in procuring evidence to prove at the trial facts which their opponents will at once concede. It has been found by long experience that the most satisfactory method of obtaining this object is to make each party in turn state his own case, and answer that of his opponent before the hearing. Such statements and the replies to them are called the *pleadings*. And in cases of difficulty and importance the Master will order the parties to deliver pleadings.

In that event, the plaintiff naturally begins; if he has not already specially indorsed his writ, he delivers a separate *State-*

ment of Claim. The defendant then puts in his *Defence*, which, besides answering the plaintiff's claim, may also set up a *Counterclaim*. The plaintiff then sometimes *replies*, and the defendant occasionally, though rarely, *rejoins*. It is very seldom that any further pleadings are ordered, but there may be *surrejoinders*, *rebutters*, and *surrebutters*. Each of these alternate pleadings must in its turn either admit or deny the facts alleged in the last-preceding pleading, it may also allege additional facts, where necessary. The points admitted by either side are thus extracted and distinguished from those in controversy, other matters, though disputed, may prove to be immaterial; and thus the litigation is narrowed down to two or three matters which are the real questions in dispute. The pleadings should always be conducted so as to evolve some clearly defined *issues*, that is, some definite propositions of law or fact, asserted by one party and denied by the other, but which both agree to be the points which they wish to have decided in the action.

When this is properly and fairly done, four advantages ensue:—

- (i.) It is a benefit to the parties themselves to know exactly what are the matters left in dispute. They may discover they are fighting about nothing at all; *e.g.*, when a plaintiff in an action of libel finds that the defendant does not assert that the words are true, he is often willing to accept an apology and costs, and so put an end to the action.
- (ii.) It is also a boon to the parties to know precisely what facts they must prove at the trial; otherwise, they may go to great trouble and expense in procuring evidence of facts which their opponent does not dispute. On the other hand, if they assume that their opponent will not raise such and such a point, they may be taken sadly by surprise at the trial.

- (iii.) Moreover, it is necessary to ascertain the nature of the controversy in order to determine the most appropriate mode of trial. It may turn out to be a pure point of law, which should be decided by a judge or by the Court; it may involve a lengthy investigation of complicated accounts, in which case the action should be at once referred to a special or official referee, or it may be a question proper for a jury.
- (iv) It is desirable to place on record what are the precise questions raised in the action, so that the parties or their successors may not fight the same battle over again.

The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree, and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules, which it is my endeavour to state and explain in the following pages. The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at the trial. But each must give his opponent a sufficient outline of his case.

History of Pleading.

This method of arriving at an issue by alternate allegations has been practised in England from the earliest times. It is apparently as ancient as any portion of our law of procedure. It certainly existed in substantially the same form in the reign of

No 49

BREACH OF PROMISE OF MARRIAGE

1 On March 12th, 1911, the plaintiff and defendant verbally promised to marry one another *

2 Relying on this promise, the plaintiff on August 3rd, 1911, permitted the defendant to seduce her.

3 The defendant now refuses to marry the plaintiff

The plaintiff claims 1,000*l* damages

[See Precedent No 76]

No. 50

COMMISSION

1 The plaintiffs are auctioneers and estate agents, carrying on business at ———, the defendant was at all times hereinafter mentioned the owner of the brewery known as ——— Brewery, Burton-on-Trent.

2 The defendant was, in the months of September and October, 1909, desirous of selling his said brewery; he employed the plaintiffs as his agents to find him a purchaser; and he undertook, in the event of the plaintiffs introducing a buyer for the said brewery, to pay them a commission of 1½ per cent on the purchase-money, payable on the purchase being completed and the money paid

3 The defendant represented to the plaintiffs that the said brewery was making a net profit of 7,000*l*, on a turnover of 25,000*l*. a year, that there were sixty-five public-houses in Birmingham, Stockport, and elsewhere "tied" to the said brewery, and that the trade he was then doing was 200 barrels a week, at a profit of 15*s* a barrel

4 The plaintiffs did introduce to the defendant a buyer, who agreed with the defendant to purchase the brewery and the defendant's interest in the said public-houses for 68,000*l*.

5 The said buyer was always ready and willing to complete the said purchase and pay the defendant the said price until he dis-

* It is unnecessary to aver that this amounts in law to a promise to marry within a reasonable time (Order XIX. r. 25), or that such reasonable time has elapsed (r 14).

Henry II The word "issue" is to be found at the very commencement of the Year Books, *i e*, in the first year of Edward II, and the distinction between an *issue en ley* and an *issue en fet* is equally ancient (See the Year Book, 3 Edw II 59) And prior even to the reign of Edward II the production of an issue had been not only the constant effect, but the professed aim and object, of pleading

At first the pleadings were oral The parties actually appeared in open Court, and a *viva voce* altercation took place in the presence of the judges These oral pleadings were conducted either by the party himself or his pleader (called *narrator* or *advocatus*), and it seems that the rule was then already established that none but a professional advocate could be a pleader in any cause not his own. It was the duty of the judge to superintend, or "moderate," the oral contention thus conducted before him In doing this, his constant aim was to compel the pleaders so to manage their alternate allegations, as at length to arrive at some specific point or matter affirmed on the one side, and denied on the other, which they both agreed was the question requiring decision When this result was attained, the parties were said to be *at issue*—*ad exitum*—the pleadings were over, and the parties were ready to go before a jury, if it were an issue of fact, or before the Court, if it were an issue of law And so strict were the judges in those days, that they allowed only one issue in respect of each cause of action; if a defendant had two defences to the same claim, he had to elect between them, it was only in the reign of Queen Victoria that the parties were allowed to raise more than a single issue, either of law or fact. Hence the question for decision came itself to be called *the issue*

During this parol altercation one of the officers of the Court was busy writing on a parchment roll an official report of the allegations of the parties and of the acts of the Court itself during the progress of the pleading. This was called *the Record*. As the suit proceeded, similar entries were made from time to time, each successive entry being called a *continuance*, and, when complete, the roll was preserved "as a perpetual intrinsic and exclusively admissible testimony of all the judicial transactions" which it purported to record

It is not known, I believe, when the system of oral pleading fell into disuse; but it gradually became the practice for each pleader,

in turn to borrow the parchment roll, and enter his statements thereon himself. Later (probably in the reign of Edward IV.), the plan was adopted of drawing up the pleadings in the first instance on paper, and interchanging them between the parties in that form, then after an issue had been arrived at, they were transcribed on to a parchment roll. This was called, "*entering the proceedings on the record*." But though the practice of oral pleading was abandoned, the ancient method of alternate allegation continued. In order that the student may understand the reports of cases which turned on the old system of pleading, it may be as well to mention that what we now call a Statement of Claim was before 1875 called a *declaration*, a Defence was called a *plea* or *pleas*; and a Reply was called a *replication*. The names of the further pleadings remain unchanged. A declaration often contained more than one *count*, each of which stated a complete and separate cause of action, and would in fact by itself have been a good and valid declaration. So, too, each plea had to be in itself a complete answer to the count to which it was pleaded.

The principles on which pleadings were framed, and the rules which regulated them, remained substantially the same till 1852. Their practical utility was, however, seriously impaired by the over-subtlety of the pleaders and by the excessive rigour with which the rules were applied, the merits of the case being constantly subordinated to technical questions of form. A determined effort was made to correct these defects by the provisions of the Common Law Procedure Acts, 1852—1860. In 1873, however, it was found necessary to adopt a more thorough method of reform, and the Judicature Act introduced into the new High Court of Justice the system of pleading which is still in force.

Leave to Plead.

Till the year 1893 in every action commenced by writ there were pleadings as a matter of course, unless both parties agreed to dispense with them. In 1893 power was given to the plaintiff, if he thought fit, to declare on his writ that he intended to proceed to trial without pleadings. If the plaintiff does so declare there will be no pleadings, unless the defendant can persuade a Master to order them; the defendant must,

however, give notice of certain special defences. (See *ante*, p. 63.) Then, in 1897, Order XXX was amended, and for the first time in the history of our law a plaintiff who wished to deliver a pleading was not allowed to do so without an order from a Master. And this is now the rule. A plaintiff who has indorsed his writ generally cannot now deliver a Statement of Claim as of right; he must first obtain leave to do so

Under the present practice, in every action which is not an Admiralty action, and which is commenced by a writ which is generally indorsed, it is now the duty of the plaintiff, as soon as the defendant has appeared, to take out a summons before the Master for directions under Order XXX. When his writ is specially indorsed under Order III r. 6, he can take out a summons for summary judgment under Order XIV. And when the plaintiff has indorsed his writ for trial without pleadings, it is still open to the defendant to apply by summons under Order XVIII^a r. 3, for a Statement of Claim. On the hearing of any of these summonses, the Master will decide whether there shall or shall not be pleadings, or further pleadings. As a general rule, without an order made on one of these three summonses, it is irregular for either party to deliver a pleading after appearance, and the costs of any pleading so delivered will, as a rule, be disallowed on taxation.

There are four* important exceptions or *quasi*-exceptions to this general rule:—

- (1.) Order XXX. only applies to the delivery of pleadings *after* appearance. Hence a plaintiff, when the case falls within Order III r. 6, may still indorse his writ with a Statement of Claim, and so deliver a

* There are three other cases of rare occurrence in which a pleading can be delivered without leave—viz :—under Order XXI. r. 14, and in the two cases mentioned in Order XXIV. r. 2.

pleading without leave (See *Anlaby v Prætorius*, 20 Q B D 764, *ante*, p 49)

(ii.) And a defendant who has appeared to a writ of summons specially indorsed under Order III r 6, can deliver a Defence without leave. He must do so within ten days from the time limited for appearance, unless such time is extended by order or consent, or unless in the meantime the plaintiff serves a summons for judgment under Order XIV., or a summons for directions (Order XXI r 6). As soon as either of these summonses is served on him, he must hold his hand and wait to see what order the Master will make on the hearing.

(iii.) Again, if the action falls within Order XIII r 12 (see *ante*, p 6), and the defendant does not appear, it is nevertheless necessary for the plaintiff to file a Statement of Claim in the offices of the Court. And this he may do without leave. Order XXX does not apply, because the defendant has not appeared. If the action is proceeding in a District Registry in a provincial town, the plaintiff must file his pleading in the District Registry, in other cases, with the clerk in the Writ, Appearance, &c Department of the Central Office in London. An affidavit of due service of the writ must be filed at the same time. (Order XIII r 12) But the writ itself, and, indeed, any document which was properly served or delivered* before the time for appearance expired, need not be filed (*Renshaw v. Renshaw*, 28 W. R. 409; *Phillips v Kearney*, 58 L. J. Ch. 344)

* Note this distinction. A pleading is always "delivered." A writ, summons, or notice of motion is "served." If the special indorsement on a writ be amended, the amended writ is not re-served, but delivered. (Order XXVIII r. 10)

covered that the representations made by the defendant as to the profit made and the trade done by the said brewery, and as to the number of tied houses attached thereto, were untrue. He then declined to complete the said purchase or to pay the said price.

6. The plaintiffs were thus prevented through the defendant's default from earning their commission on the said purchase-money, which at the rate of $1\frac{1}{2}$ per cent amounts to 1,020*l*.

7. The plaintiffs also seek to recover the said sum of 1,020*l* as money payable by the defendant to the plaintiffs for services rendered by the plaintiffs to the defendant, and for work and labour done by them for the defendant at his request.

And the plaintiffs claim 1,020*l*

- (1) as commission earned,
- (ii) as damages under paragraphs 5 and 6,
- (iii) on a *quantum meruit*

No 51



COVENANTS IN A LEASE

1. By a lease, dated December 11th, 1905, the plaintiff demised to the defendant a public-house, known as The King's Arms, High Street, in the City of Manchester, for a term of twenty-one years from September 29th, 1905, at a yearly rental of 140*l*.

2. By the said lease the defendant covenanted (*inter alia*),—

- (i) To pay the said rent to the plaintiff by equal quarterly payments on the usual quarter days.
- (ii) During the said term to keep the inside of the said premises, together with the fittings, fixtures . . . &c , in as good and tenantable repair and decorative condition as they were in on December 11th, 1905.
- (iii) Within three calendar months after notice in writing of any defects of repair should have been given to the defendant, or left upon the said premises, to repair, decorate, and amend the same accordingly.
- (iv) That no act should be done or committed, or omitted, or any offence or offences committed, whereby the licence for the time being for the vending of beer and other malt liquors on the said premises might become forfeited, or the renewal thereof refused.

- . (iv) And where a Statement of Claim is thus filed in default of appearance under Order XIII r 12, the defendant may appear and then without any order deliver a Defence within ten days from the filing of the Statement of Claim. (Order XXI r 8)

Except in Admiralty actions, no Reply can ever be delivered without an order (Order XXIII r. 1.)

When Pleadings will be Ordered

The whole object of pleadings, as we have seen, is to bring the parties to a clear issue, and thus to secure that they both know, before the action comes on for trial, what is the real point to be discussed and decided. If therefore the Master sees that the matters in controversy are already sufficiently defined, he will not order pleadings. Thus, where the writ is specially indorsed, and the defendant has filed an affidavit stating his defence, any further pleading is probably unnecessary. So if the questions in dispute have already been argued on an application for an *interim* injunction. Again, if the case be one for the commercial list, counsel frequently appear before the judge who takes cases of that class; each states orally what his client's case will be; and then as we have seen (*ante*, p. 70), Points of Claim and Points of Defence are usually ordered. Where, however, the action is not "commercial" and is not within Order III r. 6, the Master usually orders either pleadings or some particulars to be delivered. In an accident case, for instance, he will order the plaintiff to deliver particulars of the alleged negligence and of the alleged damage, the defendant to deliver particulars of contributory negligence, if he intends to rely on that defence. But in actions for the recovery of land, in actions of libel, slander, and malicious prosecution, and indeed in most actions of tort, pleadings are generally ordered.

Modern Pleadings.

No entries now are made on any parchment roll, the pleadings are written or printed on paper and interchanged between the parties, the solicitor of one party delivers his pleading to the solicitor of the other party, or to the party himself, if he does not employ a solicitor. This goes on till the pleadings are "closed." The cause is then entered for trial, for which purpose two copies of the complete pleadings are lodged with the officer of the Court (Order XXXVI. r. 30.) And the copy which is marked with the stamp denoting the fee paid on entry is regarded as the record.

Every pleading should be marked on the face with the date of the day on which it is delivered, with the letter and number of the writ (see p. 4), the title of the action, and the description of the pleading, a Statement of Claim should also state the date of the writ. It must be indorsed with the name and place of business of the solicitor and agent (if any) who delivers it, or the name and address of the party delivering it, if he does not act by a solicitor. If it contains less than ten folios (*i e.*, 720 words) it may be either printed or written or partly printed and partly written, if it contain ten folios or more, it must be printed. A folio contains seventy-two words or figures, every figure being counted as one word. Every pleading must be divided into paragraphs numbered consecutively. Dates, sums, and numbers should be expressed in figures, and not in words. It is not necessary, though it is generally desirable, that a pleading should be drawn or settled by counsel; where it has been, he must sign his name at the end of it, if not settled by counsel, it must be signed by the solicitor or by the party if he sues or defends in person.

✓ The allegations contained in every pleading must be—

(i.) Material.

(ii.) Certain.

The next two chapters are therefore devoted to Materiality and Certainty. No technical objection can, however, now be raised to any pleading on the ground of any alleged want of form (Order XIX r 26). But "the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action " (Order XIX r 27)

CHAPTER VIII
MATERIAL FACTS

Fundamental Rule

THE fundamental rule of our present system of pleading is this:—

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. (Order XIX. r. 4.)

This rule involves and requires four separate things:—

- (i.) Every pleading must state facts and not law.
- (ii.) It must state material facts and material facts only.
- (iii.) It must state facts and not the evidence by which they are to be proved.
- (iv.) It must state such facts in a summary form.

(1) EVERY PLEADING MUST STATE FACTS AND NOT LAW

Conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the Court to declare the law arising upon the facts proved before it. A plaintiff must not merely aver, "I am entitled to recover 100% from the defendant," or "It was the defendant's duty to do so and so." He must state the facts which in his opinion give him that right, or impose on the defendant that duty, and the judge will decide, when those facts are proved, what are the legal rights and duties of the parties respectively. So, too, a defendant must state clearly the facts which in his opinion afford him a defence to the plaintiff's action. He must not say merely, "I do not owe the money;" he must allege facts which show he does not owe it, *e g*, that the goods were never delivered, or were never ordered, or that they were not equal to sample. He may plead that, even assuming every fact alleged in the Statement of Claim to have happened, the plaintiff has no cause of action against him. This is called "an objection in point of law." But if he is not prepared to admit them all, he must deal with the facts alleged by his opponent, and deal with each of them clearly and explicitly. If he pleads that he never agreed as alleged, this will be taken to mean that he never in fact made any such contract—not that the contract is bad in law or not binding on him because he is an infant, or because he was induced to enter into it by fraud. All facts tending to show the insufficiency or illegality of any contract must be specially pleaded. To say, "There never was any contract," is a different thing from saying, "There was a contract, but I contend it is invalid." State the facts and prove them, and the judge will then decide the question of validity.

He knows the law, and can apply it to the facts of the case without its being stated in the pleadings

This is one of the greatest improvements introduced by the Judicature Act. Each party was, before 1875, bound to state with reasonable precision the points which he intended to raise, but this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. The other side thus learnt that the party pleading meant to prove *some* sets of facts which would sustain a given legal conclusion, but there might be many sets of facts which would sustain that legal conclusion, and which of these would be set up at the trial was not disclosed. For instance, this was a very common form of declaration: "The plaintiff sues the defendant for £—, money payable by the defendant to the plaintiff for money received by the defendant to the use of the plaintiff." That might cover any one of the following cases, and many more besides, and it could not be ascertained from the plaintiff's pleading which would be his case at the trial—

- (a) That the defendant was the plaintiff's rent collector, and had received money for him as such
- (b) That the plaintiff was entitled to an office which the defendant also claimed, and under colour of which the defendant had received fees, which the plaintiff sought to recover from him
- (c) That the plaintiff had paid the defendant the price of goods which he was to supply, and the defendant had never supplied them
- (d) That the plaintiff had paid a sum of money to the defendant by mistake, having taken him for another person of similar name or appearance

Then, again, there were often several alternative legal conclusions which could be drawn from the facts, any one of which would serve the plaintiff's turn, and therefore several "counts" were pleaded in the same declaration, giving various legal aspects of the same transaction, though the evidence given in support of each at the trial would be identical.

So, too, with the defence. In an action for goods sold and delivered, the defendant was allowed to plead "the general issue,"

as it was called, that he "never was indebted as alleged" This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defences, of which the following may serve as instances —

- (i) That he never ordered the goods
- (ii) That they were never delivered to him
- (iii) That they were not of the quality ordered
- (iv) That they were sold on a credit which had not expired at the time that the action was commenced
- (v) That there was no memorandum of the contract in writing sufficient to satisfy the Statute of Frauds

But the defendant might not, under this plea, set up the Statute of Limitations, nor allege payment or a set-off, because each of these defences implies that the defendant *was once* indebted to the plaintiff as alleged. He might deny that any express contract of sale was ever made; he might deny all or any of the matters of fact from which such a contract would by law be implied, but he could not under the plea of "never indebted" insist that the contract, though made in fact, was void in law. In short, common law pleadings, where these conclusions of law came in, were more like algebraical symbols than allegations of fact. The plaintiff pleaded x , and the defendant answered y , no one knew for certain what x and y meant, but the initiated knew that they could only mean a or b or c or d , and that they could not mean l or m or n . Now all such ambiguous formulæ are abolished, and the actual facts on which either party relies must be stated as briefly as possible in his pleading.

Illustrations

It is unnecessary to state in a pleading the principles of the common law, or to set forth the contents of a public statute.

See *Boyce v. Whitaker*, 1 Doug. 97.

Partridge v. Strange, Plowd. 84.

It is bad pleading to allege merely that a right or a duty or a liability exists; the facts must be set out which give rise to such right or create such duty or liability. Hence, where the facts stated in the pleading disclose no cause of action, the pleading will be held bad in spite of any allegation to the effect that the act was "unlawful," or "wrongful,"

- (v) To keep open the said public-house for the sale of beer and other malt liquors at all times allowed by law
- (vi) That the said business of a beer retailer should at all times be managed and conducted on the said premises in a lawful and orderly and proper manner

3 The defendant has broken all the said covenants —

- (i) He has not paid the rent which accrued due on June 24th, September 29th, and December 25th, 1910, respectively, or any part thereof
- (ii) He has not repaired the premises in accordance with the covenant in that behalf
- (iii) Notice in writing of all defects of repairs was given to the defendant on July 21st, 1910, and also left upon the said premises on August 17th, 1910, yet the defendant did not, within three calendar months from the delivery thereof, or at all, repair, decorate or amend the said premises
- (iv), (v), (vi) The retail business at the said public-house was not conducted in a lawful and orderly or proper manner, whereby the justices, on September 23rd, 1910, refused to renew the licence of the said public-house. And since the date of such refusal the said public-house has not been kept open for the sale of any malt liquors, but the said premises have ever since remained closed and unlicensed

4. By reason of the said breaches of covenants, and of the wrongful acts complained of, the plaintiff has suffered damage, and has been greatly injured in his reversion

And the plaintiff claims:—

- (1) 103*l.* 18*s* 4*d* for rent in arrear, less tax.
- (ii) 500*l.* damages for the said breaches of covenants.

No. 52



GOODS SOLD AND DELIVERED—NON-ACCEPTANCE

1 On October 20th, 1910, the defendants by their agent A. B. agreed to buy from the plaintiff, and the plaintiff bargained and sold to the defendants certain barley, then lying on the plaintiff's premises, viz, 306 sacks, at the price of 1*l.* per sack.

a plea of Not guilty, and that, in the instance before them, the plea consequently denied nothing but the fact of diversion

Frankum v. Lord Falmouth, 2 A. & E. 452.

Lush v. Russell, 5 Ex. 203; 19 L. J. Ex. 214.

If it be stated in a pleading that an officer of a corporate body was removed for misconduct by the corporate body at large, it is unnecessary to aver that such corporate body had power thus to remove him, because that is a power by law incidental to them, unless given by some charter, by-law, or other authority to a select part only of the corporation.

The King v. Lyme Regis, 1 Doug. 148.

In actions for a debt or liquidated demand in money, such as those comprised in Order III r. 6 a mere denial of the debt is inadmissible.

Order XXI r. 1

In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e.g.*, the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note

Order XXI. r. 2

In actions comprised in Order III r. 6, classes (A) and (B) (see *ante*, p. 42), a defence in denial must deny one or more of the matters of fact from which the liability of the defendant is alleged to arise, *e.g.*, in actions for goods bargained and sold or sold and delivered, the defence must deny the order or contract, and delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff

Order XXI. r. 3.

In an action of libel or slander, a defendant may not plead merely that "he published the words on a privileged occasion." He must set out the facts and circumstances on which he relies as creating the privilege, and then the judge will decide on the facts proved at the trial whether the occasion was or was not privileged

Simmonds v. Dunne, Ir. R. 5 C. L. 358

Elkington v. London Association for the Protection of Trade (1911),
27 Times L. R. 329.

In an action on an award, if the defendant pleads that the arbitrator never made any such award as alleged, this plea will now be taken to mean that no award was ever made in fact, and it will not be open to the defendant to contend that, though the arbitrator had in fact made an award, it was bad in law because it included matters not within the submission. An award is valid till it is set aside.

See *Bache v. Billingham*, (1894) 1 Q. B. 107, 69 L. T. 648.

or "improper," or "done without any justification therefor or right so to do."

Gautret v. Egerton, L R 2 C. P 371, 16 L T. 17

Day v. Brownrigg, 10 Ch. D 294, 302, 48 L. J Ch 173

West Rand Central Gold Mining Co v. Rex, (1905) 1 K B. 391, 400.

It is not sufficient for a plaintiff to say, "under and by virtue of a certain deed I am entitled," &c, for that is an inference of law. The limitations of the deed, and all other facts upon which he proposes to rely as showing that he is so entitled, must be stated.

Riddell v. Earl of Strathmore, 3 Times L R 329.

A plaintiff may no longer allege that "the defendant has received £—— to the use of the plaintiff," he must state the facts which make such receipt by the defendant a receipt to the use of the plaintiff.

See Order XXI. 1. 3, *infra*.

A Statement of Claim alleged that the deceased, "two days before his death, made a good and valid *donatio mortis causa* to the plaintiff of the whole of his moneys standing on deposit to his account at the Ellesmere Savings Bank," but did not state what the deceased in fact did. It was struck out on the ground that the facts which the plaintiff alleged to amount to a valid *donatio mortis causa* should have been set out in the Statement of Claim

In re Parton, Townsend v. Parton, 30 W. R. 287, 45 L T. 755

In an action to recover damages caused to the plaintiff's reversion in a dwelling-house by interference with an easement, it is not sufficient to allege in the Statement of Claim that the plaintiff is entitled to such easement, the plaintiff must show how he is so entitled, whether by grant, or prescription, or otherwise, and must set out the facts upon which he relies as entitling him to such easement.

Farrell v Coogan, 12 L. R Ir. 14.

In an action for damages for wrongfully diverting the water from the plaintiff's mill, before the Judicature Act, the defendant pleaded Not guilty, and the question arose, whether this plea put in issue merely the fact of the diversion of the water, or whether it also denied the plaintiff's right to the use of the stream as claimed. It was argued for the defendant that the word "wrongfully," as used in the declaration, was part of the substantive charge, and that the plea of Not guilty therefore had the effect of denying the wrong so alleged, and that it was therefore open to the defendant to show that the plaintiff had no such right to the stream as he claimed, for then the act of diversion could be no "wrong" to him. But the Court decided, after conference with the other judges, that in cases like this the word "wrongfully" did not bring the title into issue, under

When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party will be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement whether with reference to the Statute of Frauds or otherwise

Order XIX r 20

Howatson v Webb, (1907) 1 Ch 537, (1908) 1 Ch. 1.

Whenever the same legal result can be attained in several different ways it is not sufficient to aver merely that that result has been arrived at, but the facts must be stated showing how and by what means it was attained

Illustrations

Where A. claims that an estate formerly held by B. is now vested in himself, he must state in his pleading the date and nature of the conveyance or other transfer from B. to A., whether it was by deed or by will, &c

Com Dig Pleader (E. 23), (E. 24)

Plaintiff alleged that he had a right of way. It was held that he was bound to say in his Statement of Claim whether he claimed it by prescription or by grant. But a lost grant may be pleaded without stating its date or parties.

Harris v Jenkins, 22 Ch D. 481, 52 L. J. Ch. 437.

Spedding v Fitzpatrick, 38 Ch D. 410; 58 L. J. Ch. 139, 37 W R 20; 59 L T 492

Pledge v Pomfret, 74 L J. Ch. 357; 92 L T. 560.

Palmer v Guadagnoli, (1906) 2 Ch. 494, 95 L T. 258.

It is not enough for a plaintiff to reply to a plea of the Statute of Limitations that "that statute does not apply," or that "the case has been taken out of the statute." "The 3 & 4 Will. IV. c. 42, provides three modes by which a specialty debt may be taken out of the operation of that statute, and it is a prejudice to a defendant to be compelled to come prepared to meet three different matters, when perhaps the plaintiff intends to rely on one only."

Per Parke, B, in *Forsyth v. Bristowe*, 8 Ex. at p. 350.

It is not sufficient to plead "the said bill of sale is void and of no effect in law." Facts must be stated showing its invalidity, e.g., that it has not been registered, or is not in the form given in the schedule to the Bills of Sale Act.

. Action on a bond, the condition of which was that the defendant would on a certain day show a sufficient discharge of an annuity. The defendant pleaded that on that day he did offer to show a sufficient discharge. This was held insufficient, "for his plea ought to have alleged what manner of discharge he offered to show, viz, a release or other matter of discharge, upon which the Court might judge if it was sufficient or not; for the country shall not inquire of it, but it ought to be adjudged by the Court, which the judges cannot do, if the special matter be not showed to them."

Lord Lisle's Case, cited 9 Rep 25a

It is not sufficient in an action upon a contract for the defendant to plead that "the contract is rescinded." This may mean that the parties met, and in express terms agreed to put an end to the contract, or it may mean that such an intention is to be collected from a long correspondence or a whole series of transactions, or it may mean that the plaintiff himself has broken the contract in such a way as to amount to actual repudiation. The defendant must show in what manner and by what means he contends that it was rescinded.

If a man claims to be a peer, he must state whether he is a peer by writ, or by patent, or by descent, or by prescription. For if he "claims to be a peer by writ he is not a peer until he has taken his seat. . . If by patent the title is complete as soon as the patent is sealed."

Per Bayley, J., in *The King v Cooke*, 2 B. & C at p 874.

Where a party claims by inheritance, he must do more than merely state "I am the heir-at-law." He must show how he is heir, viz., as son or otherwise; and if he does not claim by immediate descent he must show the pedigree. For example, if he claims as nephew, he must show how he is nephew, whether brother's son or sister's son, and account for all who would be nearer in blood.

Dummsday v. Hughes, 3 Bos & Pul 453.

And see *Roe v. Lord*, 2 Bla Rep. 1099, and the cases there cited.

Palmer v Palmer, (1892) 1 Q B 319, 61 L. J Q B 236, overruling *Evelyn v. Evelyn*, 28 W. R 531, 42 L T. 248

And see Form, No 2, of S C., App. C, sect vii.

(ii.) EVERY PLEADING MUST STATE MATERIAL FACTS ONLY.

What facts are material?

Every fact is material which is essential to the plaintiff's cause of action or to the defendant's defence—which each must prove or fail.

Facts which are not necessary to establish either a cause of action or the defence to it are not, speaking generally, "material" within the meaning of Order XIX. r. 4, and should, therefore, be omitted from the pleading.* "All statements which need not be proved shall be omitted" (Common Law Procedure Act, 1852, s. 49.)

It is obvious, then, that the question whether a particular fact is or is not material, depends mainly on the special circumstances of the particular case. It is a question which it is not always easy to answer, and yet it is a very important one. the result of the case often depends on the ruling of the judge at the trial that it is or is not necessary that a particular fact should be proved. Sometimes it is material to allege and prove that the defendant was aware of a certain fact, at other times it is sufficient to aver that he did some act, without inquiring into the state of his mind. In some cases the defendant's intention is material in a few cases his motives. The pleader must apply his knowledge of the law, or, better still, his common-sense, to the facts stated in his instructions, and decide for himself which he must plead and which he may safely omit. Precedents may afford him some assistance, and so will books like Roscoe's *Nisi Prius*. But in the end he must rely on his own judgment. No general rule can be laid down.

* See *post*, p. 103.

.If after consideration you are still in doubt whether a particular fact is or is not material, the safer course is to plead it, if you think you can prove it. For if you omit to plead it, and it is held to be material, you cannot strictly give any evidence of that fact at the trial, unless the learned judge will give leave to amend, which will only be allowed upon terms, such as payment of costs, &c (See *Byrd v Nunn*, 5 Ch D 781, 7 Ch D 284, and *Brook v Brook*, 12 P D 19; 56 L J P 108)

Illustrations

It is sufficient if a pleading "states such facts, as would, if proved or admitted, establish the plaintiff's case" *Per Dr Lushington in*

The West of England, L R. 1 A & E. 308, 36 L. J. Adm. 4.

Here is a Statement of Claim in which the most material allegation of all has been omitted —

"The defendant instructed and employed the plaintiff to do certain work (specifying it). The plaintiff's charges for such work amounted to £——, which sum the defendant promised to pay, but has not paid, to the plaintiff."

The consideration for any contract not under seal is always material, and should be correctly set out in the Statement of Claim, except in the case of negotiable instruments, where the consideration is presumed (*post*, p. 98). If the contract be under seal, the consideration is immaterial.

In an action against a bailee, it is always material to know whether he was to be paid for his services, as this affects the degree of diligence which the law expects from him. But the amount of his remuneration is not material; it is sufficient to aver that he was to carry or warehouse the goods "for reward."

As a rule, the precise wording of a document is not material, and it is sufficient to state briefly its effect

Order XIX. r. 21.

In an action for the recovery of land, the plaintiff is not bound to set out in his Statement of Claim the precise words of the will under which he claims, even though a question has arisen as to the true construction of those words. It is enough for him to state briefly what he alleges to be the effect of such words.

Darbyshire v. Leigh, (1896) 1 Q. B. 554, 65 L. J. Q. B. 360.

But in an action of libel or slander the precise words complained of are material, and they must be set out *verbatim* in the Statement of Claim.

Harris v. Warre, 4 C. P. D. 125; 48 L. J. C. P. 310.

So, the precise wording of a covenant may be material if it be in an

unusual form, for a change of phrase may alter the legal effect of the clause.

Horsefull v Testur, 7 Taunt. 385, 1 Moore, 89.

Where either party relies on any custom of the country or of the trade as enlarging or restricting the rights given him by the ordinary law of the land or by a written contract, such custom must be specially pleaded with all necessary detail. See the replication in

Wigglesworth v Dallison, 1 Smith's L C (11th ed.) 545.

Where the parties expressly agree to limit the liability ordinarily imposed on either of them in contracts of the particular class, such limitation is material and should be alleged by the party who first purports to set out the true contract

Sharland v. Leifchild, 4 C B 529, 16 L. J. C P. 217.

Heath v Durant, 12 M & W 438, 13 L J. Ex 95.

Notice.

In an action on a bill of exchange against an indorser, the holder must allege notice of dishonour, in an action against the acceptor he need not

Bills of Exchange Act, 1882, s 48

In an action by a creditor against a surety, there is no need to allege that the creditor gave the surety notice that the principal debtor had not paid

If A.'s dog bites a human being the plaintiff must prove that A. knew that his dog was of a fierce and savage disposition, either generally or under the special circumstances. The best proof of this will be that A. knew that his dog had on some previous occasion bitten or attempted to bite a human being. Mere proof that it had, to A.'s knowledge, bitten some animal will not suffice

Thomas v. Morgan, 2 Cr M & R 496, 4 Dowl 223

Osborne v Chocqueel, (1896) 2 Q B. 109, 65 L. J Q B. 334.

Barnes v. Lucille, Ltd (1907), 96 L T 680.

But if A.'s dog bites cattle, horses, mules, asses, sheep, goats or swine, the owner of the injured animal can recover damages without proof of any such knowledge on the part of A.

6 Edw. VII. c. 32, s. 1.

Where the defendant relies on his insanity as a defence to an action of contract, he must not only plead that he was insane at the date of the contract, but also that the plaintiff knew that he was then insane

Beavan v. M'Donnell, 10 Ex. 184, 23 L. J. Ex. 326.

Imperial Loan Co. v. Stone, (1892) 1 Q B. 599, 601; 66 L. T 556

Action on a bond, the condition of which was that the defendants would keep the plaintiffs harmless and indemnified from all suits, &c. of one

Thomas Cook The defendants pleaded that they had kept the plaintiffs harmless, &c The plaintiffs replied that Cook sued them and recovered damages which they were compelled to pay, and so the defendants had not kept them harmless, &c The defendants rejoined that they had not any notice of the action or the recovery of damages, &c. The Court held that the rejoinder was bad, as the plaintiffs were not bound to give the defendants notice of Cook's action against them.

Cutler v. Southern, 1 Wms Saund 116

Intention and Motive

Whenever an injunction is applied for, it is material to allege that the defendant threatens and intends to repeat the illegal act complained of; unless such an intention can be readily inferred from the nature of the case and the facts already pleaded

Stannard v. Vestry of St Giles, 20 Ch D. p. 195, 46 L. T. 243.

Where words of praise are spoken ironically, so as to convey a defamatory meaning, it must be averred that they were so intended and understood, else the Statement of Claim will disclose no cause of action

In an action brought on a fraudulent prospectus, it is unnecessary for the plaintiff to state the *motives* which induced the defendants to issue it, or which led to the scheme of which it was a part, it is sufficient to state generally that the statements contained in the prospectus were false to the knowledge of the defendants.

Herring v. Bischoffsheim, (1876) W. N. 77

Yet where collusion is alleged between A and B., the fact that A. knew the improper motives which actuated B. is material, and for this purpose those improper motives must be stated.

British Medical, &c Life Association v. Britannia Fire Association, 59 L. T. 888.

Where it is alleged that the defendant has obstructed a public right of way, it is immaterial to allege that A. B. induced the defendant to do so "for his own private interest," &c. The plaintiff should plead merely that the defendant has obstructed the right of way: it does not matter why he did it.

Murray v. Epsom Local Board, (1897) 1 Ch. 35; 75 L. T. 579.

Provincial Bank of Ireland v. Brocklebank, 26 L. R. Ir. 572.

Where defamatory words are published on an occasion which is not privileged, it is not necessary to aver that they were published maliciously. But if the occasion be privileged, then malice becomes material.

Anon., Style, 392

Belt v. Lawes, 51 L. J. Q. B. 359.

Each party must state his whole case. He must plead all facts on which he intends to rely, otherwise he cannot strictly give any evidence of them at the trial. "The plaintiff is not entitled to relief except in regard to that which is alleged in the pleadings and proved at the trial." (*Per Warrington, J*, in *In re Wrightson*, (1908) 1 Ch at p 799) The Statement of Claim must disclose a good cause of action. the defendant must show a good defence thereto. Omit no averment which is essential to success. Do not plead half a defence and leave the rest to be inferred.

Illustrations

By a lease dated March 2nd, 1889, the plaintiff demised a house to A. for the term of twenty-one years at the yearly rental of 120*l.*, payable quarterly. A. is dead, the defendant is living in the house; three quarters' rent is in arrear, for which the plaintiff has issued a writ. A Statement of Claim which disclosed those facts and nothing more would be bad, the plaintiff must show that defendant is assignee of the lease and liable on the covenant to pay the rent thereby reserved, he may be merely a sub-lessee who has regularly paid his rent to A.'s executors

Warden of Sir Roger Cholmeley's School v. Sewell and others,
(1893) 2 Q. B. 254; 41 W. R. 637; 69 L. T. 118.

If a commoner sue for a nuisance to the common (*e.g.* where the defendant has dug a pit in the common), he must aver that his enjoyment of his right of common has thereby been appreciably impaired (*per quod communiam suam in tam amplo modo habere non potuit*), as otherwise he has no cause of action.

Per Lord Holt, C. J., in *Ashby v. White*, 1 Sm. L. C. (11th ed.) at p 262.

Mary's Case, 9 Rep. 113; Co. Litt 56 a.

And see *Rose v. Groves*, 5 M. & Gr 613, 12 L. J. C. P. 251.

Dobson v. Blackmore, 9 Q. B. 991, 16 L. J. Q. B. 233

In an action of slander, if the words are actionable only by reason of their being spoken of the plaintiff in the way of his office, profession, or trade, the Statement of Claim must contain an averment that the plaintiff actually held the office or carried on the profession or trade at the time when the words were spoken. And there should also be an averment that the words were spoken of the plaintiff with reference to such office, profession, or trade.

Gallwey v. Marshall, 9 Ex 300, 23 L. J. Ex. 78, 2 C. L. R. 399.

2. All the said barley has been delivered by the plaintiff to the defendants, but the defendants have refused and still refuse to pay for the same

3. Alternatively, the plaintiff says that the defendants have accepted part of the said barley, viz, 44 sacks; but have refused and still refuse to accept the remainder of the said barley, or to pay for the said 44 sacks

The plaintiff claims—

(a) under paragraphs 1 and 2—306*l*. or

(b) under paragraph 3—

(i) 44*l*.

(ii) damages.

[See Precedents Nos 82, 109]

No. 53.

LIABILITY OF A TENANT TO REPAIR AT COMMON LAW

1. The defendant was tenant to the plaintiff of a messuage and premises of the plaintiff's, situate at ——— in the county of ——— His tenancy determined on June 24th, 1911

2. During the said tenancy the defendant wrongfully permitted waste to the said messuage and premises by suffering the walls, doors, windows, floors and roof thereof to become ruinous and in decay for want of needful repair

3. In the alternative, the plaintiff says that it was an implied term of the defendant's tenancy that the defendant should during the said tenancy keep the said messuage and premises in tenantable repair, order and condition, and use them in a tenantable and proper manner, and should at the expiration of the said tenancy deliver up to the plaintiff the said messuage and premises, with all fixtures thereon, in the same state and condition as they were in at the time of the defendant's entry thereon, reasonable wear and tear only excepted

4. The defendant during the said tenancy did not keep the said messuage or the said premises in tenantable repair, order and condition, but used them in an untenable and improper manner, and did not at the expiration of the said tenancy deliver up to the plaintiff the said messuage and premises, with all fixtures thereon, in the same state and condition as they were in at

In an action against a carrier for the loss of a parcel, the defendant cannot set up at the trial that the parcel was above 10*l.* in value, and that no notice of its value was given at the time of its being delivered, as required by 11 Geo. IV. & 1 Will. IV. c. 68, unless this defence has been specially pleaded. It is not sufficient merely to deny the contract alleged by the plaintiff

Syns v. Chaplin, 5 A. & E. 634, 1 N. & P. 129

Action of replevin for wrongfully seizing cattle. The defendant avowed taking them in the close in question for rent in arrear. The plaintiff pleaded in bar to this avowry that the cattle were not levant and couchant on the close in question. This was held a bad plea. For it is a general rule of law that all things upon the premises are distrainable for rent in arrear, and the levancy and couchancy of the cattle is immaterial, unless under special circumstances such as did not appear by the plea in bar to have existed in this case.

Jones v. Powell, 5 B. & C. 647; 8 D. & R. 416.

See also *Hall v. Tapper*, 3 B. & Ad. 655.

In an action brought by a commoner against a stranger for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a licence from the lord to put his cattle there, but he did not aver that there was sufficient common left for the commoners, this was held to be no good plea, for the lord had no right to give a stranger such licence unless there was enough common left for the commoners. It was urged that it was rather for the plaintiff to reply that there was not enough common left, but the Court held that the defendant was bound to plead all such facts as were necessary to make good the defence he had pleaded.

Smith v. Feverell, 2 Mod. 6, 1 Freem. 190

Greenhow v. Ilsley, Willes, 619

“Regularly whensoever a man doth anything by force of a warrant or authority, he must plead it”

Co. Litt. 283*a*, *ibid* 303*b*; 1 Wms. Saund. 298, n. (1).

Sometimes the whole point of the action turns on one minute allegation. Thus:—

In an action of trespass for assault and battery, the defendant pleaded that a judgment was recovered and execution issued thereupon against a third person, and that the plaintiff, to rescue that person's goods from the execution, assaulted the bailiffs, and that in aid of the bailiffs and by their command the defendant *molliter manus imposuit* upon the plaintiff, to prevent his rescue of the goods. It was held that it was unneces-

sary to aver any command of the bailiffs, for even without their command, the defendant might lawfully interfere to prevent a rescue, which is a breach of the peace

Bridgwater v. Bythway, 3 Lev 113.

It is otherwise if not done to prevent a rescue, for in a case where the defendant justifies merely as assistant to and by command of, a person executing legal process, the command is material, and must be alleged, as without it the defendant would be a mere volunteer, meddling in other people's business.

Britton v. Cole, 1 Ld Raym 305, 1 Salk 409; Carth. 443.

Do not leap before you come to the Stile

But the pleader should never allege any fact which is not material at the present state of the action, even though he may reasonably suppose that it may become material hereafter. It is sufficient that each pleading in turn should contain in itself a good *prima facie* case, without reference to possible objections not yet urged. It is not necessary to anticipate the answer of the adversary, to do so, according to Hale, C. J., is "like leaping before one comes to the stile" (*Sir Ralph Bovey's Case*, Vent. 217)

"It is no part of a Statement of Claim to anticipate the Defence, and to state what the plaintiff would have to say in answer to it. That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant, and make charges in reply to them." (*Per James, L J*, in *Hall v. Eve*, 4 Ch. D. at p 345) So, too, it is quite unnecessary for the defendant to excuse himself from matters of which he is not yet accused, or to plead to causes of action which do not appear in the Statement of Claim (*Rassam v Budge*, (1893) 1 Q. B. 571.)

Illustrations.

In an action of debt, it is "premature" for the plaintiff to allege in his Statement of Claim facts which will, he hopes, take the case out of the

Statute of Limitations. If he does, "the defendant need not answer" them.

Hollis v. Palmer, 2 Bing. N. C. at p 718.

In an action of account, it is sufficient for the plaintiff in the first instance to allege facts which show that the defendant is *prima facie* liable to account to the plaintiff for certain moneys. If the defendant in his Defence sets up that all accounts up to a certain date were settled between them (see *post*, p. 231), it will then be for the plaintiff to state in his Reply the facts which may entitle him to have such settled account re-opened. Such facts would be immaterial in the original Statement of Claim.

In pleading a devise of land it is enough to state that A. was seised of the land in fee, and devised it by his last will in writing, without alleging that A. was then of full age. For if he were under twenty-one when he made his will, it is for the other party to show this, it need not be denied by anticipation.

Stonell v. Lord Zouch, Plowd. 376.

So in claiming a debt due under a bond, it is unnecessary to allege that the defendant was of full age when he executed the bond.

Walsingham's Case, Plowd 364.

Sir Ralph Borey's Case, Vent. 217.

It is bad pleading in a Statement of Claim for trespass and conversion of goods to continue thus.—"The defendant committed the alleged trespass and seized and carried away the said goods under colour of a pretended bill of sale alleged to have been given him by the plaintiff, whereby, &c. But the said bill of sale, if any, has never been registered, and is also void in law because it is not in conformity with the form in the schedule to the Bills of Sale Act," &c. This is leaping before you come to the stile. Leave the defendant to set up his bill of sale, if he thinks he can make anything of it; and plead its invalidity in your Reply. He may have some other perfectly good defence, and never plead the bill of sale at all.

In an action for a libel, it would be bad pleading for the plaintiff to say in his Statement of Claim, "The defendant will contend that the said words are part of a fair and accurate report of a judicial proceeding; but such report was neither fair nor accurate." How do you know what the defendant will contend? Do not suggest defences to your opponent. There is no necessity for the plaintiff to mention the judicial proceeding or to state that the words form part of any report.

A charterparty contained a covenant "that no claim should be admitted or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by

four shipwrights to be indifferently chosen by both parties " In an action brought on this charterparty to recover for short tonnage, the plaintiff had a verdict; and the defendants moved in arrest of judgment that it had not been averred in the declaration that a survey was taken, and short tonnage made to appear But the Court held that if such survey had not been taken, this was matter of defence which ought to have been shown by the defendants, and refused to arrest the judgment.

Hotham v. East India Co, 1 T. R. 638, 1 Dougl. 272.

In an action brought against the defendant, as *executrix* of J. S., on a bond given by J. S., in his lifetime, she pleaded in abatement that J. S. died *intestate*, and that *administration* was granted to her. On demurrer, it was objected that the plea was insufficient, that it should have gone on to aver that she never meddled with the estate before administration was granted, because, if she so meddled, she thereby became at once an *executrix de son tort*, and as such would be properly sued as *executrix*, notwithstanding the subsequent grant of letters of administration. But the Court held the plea good in that respect. And Holt, C. J., said, "It is enough for her to show that the plaintiff's writ ought to abate, which she has done in showing that she is chargeable only by another name. Then, as to the traverse that she did not administer as *executrix* before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration, which would be against a rule of law, that a man shall never traverse that which the plaintiff has not alleged in his declaration "

Powers v. Cook, 1 Ld. Raym. 63, 1 Salk 298.

"Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies on the other side." (Order XIX r. 25)

Illustrations.

A plaintiff need not, in his pleading, set out the consideration for which a bill of exchange was given him, when he sues only on the bill. It will be for the defendant to plead no consideration. It is otherwise when the plaintiff sues on the consideration as a substantive ground of claim, then, of course, he must allege it specifically.

Order XIX r. 25

In an action for goods sold and delivered, it is unnecessary, in addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were goods of the plaintiff, for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller.

Buller, N. P. 139

In a claim for money lent, it is unnecessary to aver that the money was lent by the plaintiff to the defendant *at his request*, for no man lends money unasked.

Victors v Davies, 12 M. & W. 758, 13 L. J. Ex. 241.

Where the plaintiff is or was in possession of any land or chattel, it is sufficient against a wrongdoer to aver possession only, and the plaintiff need not set out his title *Omnia presumuntur contra spoliatores*.

Armory v Delamirie, 1 Sm. L. C. (11th ed.) 356.

Whenever the rule of law applicable to the case has an exception to it (as it generally has), all facts are material which tend to take the case out of the rule and bring it within the exception. And so are all facts which tend to take the case out of the exception and keep it within the rule.

Whenever there is a conflict between law and equity on any relevant point, all facts are material which tend either to raise or oust the equity.

Whenever the right claimed or the defence raised is the creature of statute, being unknown to the common law, every fact must be alleged necessary to bring the case within the statute.

When the right claimed or the defence raised existed at common law, but the common law applicable to the case has been materially altered in its substance by statute, all facts are material which tend to take the case out of the rule at common law and bring it within the statute. And so are all facts which tend to show that the statute does not apply to the particular case.

But where the right claimed or the defence raised existed at common law, and the subsequent statute has not affected its validity, but merely introduced regulations as to the mode of its existence or performance, the statute does not affect the form of pleading. It is sufficient to allege whatever was sufficient before the statute. (See 1 Wms Saund. 211, n. (2), 276, n. (2); *Birch v. Bellamy*, 12 Mod 540, *Charlie v. Bel-*

shaw, 6 Bing 529, *Prestney v. Mayor and Corporation of Colchester*, 21 Ch. D. 111.)

Illustrations.

At common law the assignee of a debt could not sue at all; in equity he could sue if he made the assignor a party. Now by the Judicature Act, 1873, s 25, sub-s 6, he can sue alone if the debt be absolutely assigned to him by writing under the hand of the assignor, and express notice in writing of such assignment has been given to the debtor. The Statement of Claim of such an assignee suing alone must expressly allege—

- (a) an absolute assignment
- (b) in writing, and
- (c) notice of such assignment
- (d) given in writing to the debtor.

For without these averments the case is not brought within the statute and the plaintiff has no right to bring the action.

Seear v. Lawson, 16 Ch. D. 121; 50 L. J. Ch. 139; 29 W. R. 109; 43 L. T. 716.

Satchwell v. Clarke, 66 L. T. 641, 8 Times L. R. 592.

Hughes v. Pump House Hotel Co. (No. 1), (1902) 2 K. B. 190.

By sect. 14 of the Conveyancing Act, 1881, a landlord cannot eject a tenant for breach of covenant to repair without serving on him, a reasonable time before the writ is issued, a notice in writing specifying the repairs that are needed and other matters. Need a landlord suing for recovery of possession allege in his Statement of Claim that he did give such a notice a reasonable time before action? No for he has a perfectly good right of entry without it; the statute merely regulates his exercise of that right, in other words, it imposes a fresh condition precedent to his right of action. His due performance of the requirements of the statute will therefore be presumed until the defendant pleads that he never was served with any such notice. For the form of that plea, see *Bullen & Leake* (5th ed.), p. 764.

A plaintiff need not show in his Statement of Claim that the Statute of Frauds has been complied with. It is for the defendant to plead that it has not, and it will then be for the plaintiff to prove that it has.

Catling v. King, 5 Ch. D. 660; 46 L. J. Ch. 384; 25 W. R. 550; 36 L. T. 526.

Dawkins v. Lord Penrhyn, 4 App. Cas. 51, 58; 48 L. J. Ch. 304; 27 W. R. 173, 39 L. T. 583.

Young v. Austen, L. R. 4 C. P. 553; 38 L. J. C. P. 233; 18 W. R. 63; 21 L. T. 327.

In an action brought against a husband and wife, married since the passing of the Married Women's Property Act, 1874, for the recovery of a debt which the wife contracted before the marriage, it is not necessary for the plaintiff to allege in his Statement of Claim that the husband has received any property with or through his wife. At common law the husband is liable for such a debt. It is for him, therefore, to plead the statutory restriction of his liability.

Matthews v. Whittle, 13 Ch. D. 811, 49 L. J. Ch 359, 28 W. R. 822; 43 L. T. 111

Conditions Precedent

Neither party need allege the performance of any condition precedent. The party who desires to contest the performance or occurrence of any condition precedent must raise the point specifically in his pleading. "Subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." (Order XIX. r 14)

Note the wording of this rule. It does not say such an averment is immaterial, only that it shall be implied. There is a reason for this. Although it is no longer necessary for a plaintiff to plead the due performance of all conditions precedent to his right of action, yet the burden of *proving* due performance is still on him, if the defendant specially plead non-performance. In former days it was essential for a plaintiff to set out in his declaration every condition precedent to his right, and to aver the due performance of it with all particularity. Then came the Common Law Procedure Act, 1852, s. 57 of which provided: "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest." And now a general averment of the due performance of all conditions precedent is implied in every pleading.

But what is a condition precedent? and how does it differ from the material facts which must be pleaded?

Where everything has happened which would at common law

primâ facie entitle a man to a certain sum of money, or vest in him a certain right of action; and yet in this particular case there is something further to be done, or something more must happen before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed, this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on what otherwise would have been valid. Hence the plaintiff can draft a perfectly good Statement of Claim without any reference to it, and it is for the defendant to raise the point if he thinks the plaintiff has not performed all that is required of him. If neither party refer to the condition, it will probably be because it has been duly complied with, anyhow its due performance will in that event be presumed.

Illustrations

A. agrees to build a house for B, according to a specification in writing, for 3,000*l*. A has built the house according to the specification. But by the agreement to which such specification is scheduled he agreed that payment should only be made upon the architect's certificate that so much is due. Obtaining and presenting such a certificate is, therefore, a condition precedent to his right to receive the 3,000*l*. But he can draft a Statement of Claim showing a good *primâ facie* right to the 3,000*l*., without mentioning any certificate. It will be for the defendant to plead that the architect has never certified that the amount is due.

Precedent, No 78.

And see *Hotham v. East India Co.*, 1 T R. 638, *ante*, p. 98.

Notice of action was made by certain public general Acts of Parliament a condition precedent to a plaintiff's right to sue various public functionaries. But these Acts are now all repealed, so far as this requirement is concerned, by

56 & 57 Vict. c. 61, s. 2.

No solicitor can commence an action for his costs till one clear calendar month after he has delivered a bill of costs (6 & 7 Vict. c. 73, s. 37). Yet he need not allege in his Statement of Claim that he duly delivered to the defendant a bill in accordance with the Act. The defendant must plead that no bill was delivered, and then it will be for the plaintiff to prove its delivery.

Lane v. Glenny, 7 A. & E. 83

Yet the fact that a notice under sect. 14 of the Conveyancing Act, 1881,

was not given by a landlord to his tenant in sufficient time to enable the latter to remedy the breaches complained of before the commencement of the action, was held by Neville, J., not to be a condition precedent within the meaning of this rule.

Hopley v. Tarvin Parish Council (1910), 74 J. P. 209

Matters affecting Damages

A "material fact" has been defined (*ante*, p. 90) as a fact which is essential to the plaintiff's cause of action or to the defendant's defence. But there are many facts which are not material on the main issue whether plaintiff ought to succeed or not, and which yet will be proved and discussed at the trial, because they affect the amount of *damages* which he will be entitled to recover. Such facts are called "matters in aggravation of damages," or "matters in mitigation of damages." How far is it right for the plaintiff and the defendant respectively to state such facts in their pleading?

The law on this point is not clear, but the better opinion is (in spite of the decision in *Mullington v. Loring*, 6 Q. B. D. 190) that matters which merely tend to increase or diminish the amount of damages, and which do not concern the right of action, are strictly not "material facts" within the meaning of Order XIX. r. 4, and therefore ought not to be pleaded. Nevertheless, as a matter of practice, both parties are now allowed to plead or not to plead such facts, at their pleasure, if they wish to interrogate about them, it is as well to plead them.

This practice, though convenient, is somewhat illogical, for only material facts may be pleaded, and each party must plead all material facts on which he intends to rely. There is no intermediate class possible of facts which are so far material that you may plead them if you like, and yet not so material that you are obliged to plead them.

The difficulty is caused mainly by the decision in *Mullington v. Loring*. The learned judges there appeared to assume that any fact which it would be open to either party to prove at the trial was a material fact within the rules of pleading. The applica-

tion made to them was to strike certain matters out of the Statement of Claim as being scandalous and embarrassing, and this they rightly refused to do. They did not expressly decide that such matters could not have been given in evidence at the trial, unless they had been pleaded, though surely that is the logical result of holding that they were material facts. (See also *Lamb v. Beaumont*, 49 L. T. 772, *Whitney v. Morguard*, 24 Q. B. D. 630.) Then, again, in *Scott v. Sampson* (8 Q. B. D. 491; 51 L. J. Q. B. 380, 30 W. R. 541, 46 L. T. 412), the Divisional Court apparently decided that a defendant must always plead facts in mitigation of damages in his Defence. But that was an action of libel, and since that decision a new rule has been made, Order XXXVI. r. 37, requiring a defendant in any action of libel or slander, who has not pleaded a justification, to deliver to the plaintiff, seven days at least before the trial, particulars of the facts on which he proposes to rely in mitigation of damages, thus clearly implying that such a defendant is not bound to set such matters out in his Defence. It is impossible to draw any clear distinction between matters in aggravation and matters in mitigation of damages in this respect. If the former are material facts, the latter must be so too; and it would seem to follow that the decisions in *Wood v. Earl of Durham*, 21 Q. B. D. 501, and *Wood v. Cox*, 4 Times L. R. 550, practically overrule the decision of the Divisional Court in *Millington v. Loring*, and that neither matters in aggravation, nor matters in mitigation, of damages are material facts, and that therefore strictly neither should be pleaded.

At the same time there seems no sufficient ground for striking out such matters, if they be pleaded. It can scarcely be said that such a method of pleading embarrasses either party, for it gives him notice what his opponent's case will be at the trial. Hence, if such matters are pleaded, as a rule no objection is made. And thus has arisen the practice which I have described above as convenient though illogical. Order XXI. r. 4 throws no light on the question, it has no bearing on matters which the defendant proposes to plead in mitigation of damages.

There is, however, one exception. In an action of libel or slander the defendant may, in mitigation of damages, by a

special plea, justify part of the words, provided such part is distinct and severable from the rest. (*Davis v. Billing*, 8 Times L. R. 58.) The plea must distinctly identify the portion justified. (*Vessey v. Pike*, 3 C. & P 512.) Without such a plea the defendant can give no evidence that any portion of his words is true, not even though he has given a notice under Order XXXVI. r. 37

In early days, when the Courts were very strict, they punished either party who pleaded immaterial facts in this way. If his opponent pleaded to such immaterial facts, and issue was joined thereon, they compelled the party who had alleged such facts to prove them literally, although they were immaterial, otherwise he failed in his action. He had himself raised the issue, so he must prove it or take the consequences. (See *Wood v Budden*, Hobart, 119; *Cudlip v. Rundle*, Carthew, 202, *Bristow v Wright*, Douglas, 665; *Sir Francis Leke's Case*, 3 Dyer, 365, 2 Wms Saund. 206 a, n. (22).)

Subsequently, however, the Courts adopted a far better method of preventing the parties from raising immaterial issues. They declared that "immaterial allegations were not traversable," i.e., neither party was allowed to plead to any immaterial matter in his opponent's pleading, but must treat it as surplusage, and leave it alone. Thus no issue could be raised on it, and the party pleading it was no longer bound to prove it at the trial. (See *Lane v. Alexander*, Yolverton, 122, *Osborne v. Rogers*, 1 Wms. Saund. 267, *Alsager v. Currie*, 11 M & W 14.)

And now the Courts never compel either party to prove at the trial more than the substance of his pleading, even though his opponent may have expressly traversed some immaterial averment contained in it.

- (111) EVERY PLEADING MUST STATE FACTS, AND NOT THE EVIDENCE BY WHICH THEY ARE TO BE PROVED.

Facts should be alleged as facts. It is not necessary to state in the pleadings circumstances which merely tend to prove the truth of the facts already alleged

The fact in issue between the parties is the *factum probandum*, the fact to be proved, and therefore the fact to be alleged. It is unnecessary to tell the other side how it is proposed to prove that fact; such matters are merely evidence, *facta probantia*, facts by means of which one proves the fact in issue. Such facts will be *relevant* at the trial, but they are *not material facts* for pleading purposes.

This was always a clear rule of the common law. "Evidence shall never be pleaded, because it tends to prove matter in fact, and therefore the matter in fact shall be pleaded" (*Dowman's Case* (1586), 9 Rep. 9 b.)

In Chancery, however, this rule was never observed: the pleadings there were lengthy narratives which sometimes became intolerably prolix. They stated the evidence on which the party proposed to rely in full detail, with copious extracts from the material documents. They were more like lengthy affidavits than modern pleadings.

This was to some extent due to the nature of the matters with which equity Courts had to deal, for even now an equitable defence or reply is pleaded in the King's Bench Division somewhat more in detail than is usual in the case of ordinary legal defences or replies. (See *Heap v. Marris*, 2 Q. B. D. 630.) Moreover, it is not always easy to decide what are the facts to be proved, and what is only evidence of those facts. The question is often to some extent one of degree. "There are many cases in which facts and evidence are so mixed up as to be almost indistinguishable" (*Smith v. West*, (1876) W. N. 55.) But in most cases the line is sharp and clear between the fact in issue and the

evidence by which that fact would be proved "The difference, although not so easy to express, is perfectly easy to understand" (*Per Brett, L. J.*, in *Philipps v Philipps*, 4 Q B D at p 133) "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation" (*Per Lord Denman, C. J.*, in *Williams v Wilcox*, 8 A & E at p 331.)

Illustrations.

Action on a policy of insurance on the life of A. Defence that A. committed suicide, in which event the company, by the express terms of the policy, is not liable. The issue is, Did A. kill himself? The facts that he had for weeks been in a moody, miserable state, that he bought a pistol the day before his death, that he was found shot, with that pistol in his hand, that on him was found a letter to his wife stating that he intended to kill himself, &c., these are all "evidentiary facts" which go to prove the fact in issue. None of these should therefore be pleaded. The Defence should merely state, "The said A. died by his own hand," or whatever are the exact words of the condition on the back of the policy.

See *Borradale v. Hunter*, 5 Man. & Gr. 639

It would be still worse pleading to aver in the Defence that the coroner had held an inquest on A.'s body, and that the jury had returned a verdict of *felo de se*. For such a verdict would not be evidence either for or against the company, and such an allegation would be struck out as an attempt to prejudice the fair trial of the action.

See *Smith v The British Insurance Association*, (1883) W. N. 232, and *Lumb v. Beaumont*, 49 L. T. 772

Where the main question in an action is, Was the defendant partner with his father in the Lime Street business? it would be bad pleading to allege that the defendant shared in the profits and contributed to the losses incurred in the business, or any other facts which tend to show that he was a partner. Plead merely, "The defendant throughout the year 1909 carried on business at No. 21, Lime Street, in partnership with his father, under the style or firm of 'Davis & Son.'"

If the only point in dispute be, Had A. authority to make a certain contract on behalf of the defendant? the plaintiff may plead either that "the defendant employed A. as his agent to make the said contract on his behalf," or that "the defendant held A. out as having authority to make the said contract on his behalf." But he may not allege that "when A. made the contract he represented that he was the defendant's agent, and had authority from him to enter into the said contract on his behalf." And

it is ridiculous to plead, as was once done, that A. "has all along been regarded by the lessor, the bankers, and the plaintiff himself, as the agent of the defendant."

If the plaintiff's case is that certain damage has happened to him in consequence of some wrongful act of the defendant's, it is not necessary to set out the facts which show the connection between the damage and the wrongful act. These are but evidence of the plaintiff's assertion that the damage which he has sustained is the consequence of the defendant's act. It is sufficient to allege the wrongful act in the Statement of Claim, and then to continue, "The plaintiff has thereby suffered, &c, and been put to great expense in, &c." (specifying the damages).

"If both the unlawful act and the consequence are stated, it is unnecessary to allege the means by which that act produced that consequence. . . . The means are matter of evidence."

Per Lord Mansfield, C. J., and Buller, J, in *Rex v. Eccles*,
3 Dougl at p 337

"Where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out, but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out."

Per Brett, L. J., in *Phillips v. Phillips*, 4 Q. B. D at p 134.

In an action of covenant the plaintiff declared that the defendant by indenture demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same according to the form and effect of the said indenture, and then the plaintiff assigned as a breach that the defendant had not full power and lawful authority to demise the said premises according to the form and effect of the said indenture. After verdict for the plaintiff it was assigned for error, that he had not in his declaration shown "what person had right, title, estate or interest in the said premises, by which it might appear to the Court that the defendant had not full power and lawful authority to demise." But upon conference and debate amongst the justices it was resolved "that the assignment of the breach of covenant was good, for he has followed the words of the covenant negatively"; and to state what person had a better estate or interest than the defendant in the demised premises would be pleading evidence of the main allegation that the defendant had not full power and authority to demise.

Robert Bradshaw's Case, 9 Rep. 60 b.

So, to a claim for labour and medicines for curing the defendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries. It was objected to this replication, that the plaintiff had not set out how or in what manner the medicines

the time of the defendant's entry thereon, reasonable wear and tear only excepted

And the plaintiff claims ———l damages

✓ No 54

LOST LUGGAGE.

1 The plaintiff, on the 24th day of July, 1911, was received by the defendants as a passenger for the purpose of being carried with her portmanteau by train on the defendants' railway from Liverpool to London, for reward to the defendants

2 The defendants thereupon received and took charge of the said portmanteau, which contained the plaintiff's wearing apparel, &c, and placed it in their luggage van at Liverpool in the train in which the plaintiff was about to travel, for the purpose of its being carried to London

3 The defendants did not carry the said portmanteau to London, nor did they deliver it to the plaintiff on her arrival by the said train there, or within a reasonable time thereafter, or at all.

4 The defendants have either lost or retained the said portmanteau, whereby the plaintiff has been and still is deprived of the said portmanteau and its contents, and has suffered great inconvenience, and has incurred expense in endeavouring to recover possession thereof

And the plaintiff claims damages, 100l

No. 55

MONEY OVERPAID

1 By an indenture, dated November 16th, 1907, J. S guaranteed to the defendants the payment of any sum which might thereafter become payable to them by his son, Charles S.

2 On April 18th, 1910, Charles S. was adjudicated bankrupt. On that day he owed the defendants 1,081l. 16s., and no more. No further sums have become payable by him to the defendants

3 Since that date J S paid the defendants 325l. on account of his indebtedness to them under the said guarantee

were necessary, but it was adjudged that the replication in this general form was good.

Huggins v. Wiseman, Carth. 110.

There is a curious long plea in abatement,* which occupies eight pages of the report, in which all manner of evidence is pleaded to show that the defendant was an earl, and had been received as an earl, and had voted as an earl, &c., but it strangely enough nowhere contained "a distinct allegation of the thing to be proved, that the defendant *was* Earl of Stirling at the time of the writ" It was therefore struck out.

Digby v. Alexander, 8 Bing. 416, 430.

Where time has not been made of the essence of the contract it is sufficient to aver that the work was done or the event happened "within a reasonable time in that behalf." It is unnecessary to explain that the weather was bad, or that the men struck work, or to state any other reason why it took so long that is the evidence by which you are going to prove your assertion that the time in fact occupied was a reasonable time.

Eaton v. Southby, Willes, 131, *post*, p. 122.

Where the plaintiff pleaded that he had "been informed by the defendant" that, &c, the paragraph was struck out. This was stating the evidence by which he proposed at the trial to prove the fact in issue.

Jones v. Turner, (1875) W. N. 239

A Statement of Claim set out in full a multitude of letters which were said to be material because they contained admissions But the Court held that if that were so, still admissions were only evidence, and that facts and not evidence should alone be pleaded The letters were accordingly struck out

Dury v. Garrett, 7 Ch. D. 473, 47 L. J. Ch. 218; 26 W. R. 225; 38 L. T. 77.

The plaintiff alleged that certain windows of his were ancient lights The defendant pleaded that in another action the plaintiff had sworn they were not ancient. This allegation was struck out.

Lumb v. Beaumont, 49 L. T. 772.

Where M. had insured his life, assigned the policy to the plaintiff, and disappeared, and the defendant has reason to believe that the disappearance was fraudulent and collusive, he should plead merely that M. is not dead. He should not allege a conspiracy between M. and the plaintiff, and set out other frauds which they had jointly committed; for this is

* This term is defined *post*, p. 145

merely matter which goes to prove that M is not dead, and that is the real question at issue in the action.

Provincial Bank of Ireland v. Brocklebank, 26 L. R. Ir 572

And see *Murray v. Epsom Local Board*, (1897) 1 Ch 35, 75 L. T 579.

Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Order XIX. r 22.

Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material.

Order XIX. r 23

So, too, it is sufficient for his opponent to deny notice generally.

Pennington v. Beechey, 2 Sim. & St 282

Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

Order XIX. r 24.

In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings

Order XX r. 8.

That is to say If a butcher and a baker each deal at the other's shop, and at the end of the year they settle accounts and strike a balance, showing that the baker owes the butcher 32l 18s. 7d., and the baker checks the figures and agrees to the balance, then that is a settled account, on which the butcher can sue, if he likes, as a substantive cause of action. If he sues on the settled account, he must state when and where and between whom it was settled, but he should not refer to butcher's meat or to loaves. If, on the other hand, he prefers to sue for the price of butcher's meat sold and delivered, giving credit for the amount due from him for bread, he can do so, and then his pleading should contain no reference whatever to the account stated, as it is in that action only an admission that so much is due

See *post*, pp 206, 231, and Precedents, Nos. 33, 81.

(iv.) EVERY PLEADING MUST STATE MATERIAL FACTS IN A
SUMMARY FORM

In the first place, material facts must be stated clearly and definitely. Be as concise as you can, provided you do not thereby become obscure. Pleadings are useless unless they state facts with precision. The names of persons and places, if material, must be accurately given. Avoid pronouns, it often is not clear whom you mean by "he." Repeat "the plaintiff," or "the said Johnson," whenever "he" would be ambiguous. Use relative pronouns as little as possible; when you do use them see that each has its proper antecedent. Call things by their right names, so far as you can, but in any event always allude to the same thing by the same name. Keep to the same phraseology throughout the pleading. If you are suing on a document, or relying on an Act of Parliament, do not attempt to improve on the language of either (however strong the temptation may be, especially in the latter case). A change of phrase suggests a change of meaning.

Illustrations.

The plaintiff and defendant should not be mentioned by name in the body of a pleading. They should always be called "the plaintiff" and "the defendant," or, if more than one, "the male plaintiff," "the female plaintiff," "the defendant Smith," "the defendant Robinson," or, if both defendants bear the same surname, "the defendant Henry," "the defendant John."

The name of any other person, not a party to the suit, should be given in full, if known, the first time he is mentioned. Afterwards he can be referred to by his surname only, as "the said Johnson."

It does not matter in the least whether you allude to the cottage claimed by the plaintiff as "the said cottage," or "the said house," or "the said messuage," or "the said premises." But whichever phrase you use the first time should be used throughout the pleading.

It will lead to confusion if you refer to the same document sometimes

as "the indenture of May 20th, 1909," sometimes as "the said lease," and sometimes as "the agreement between the parties" In fact, it is technically wrong to call a contract under seal an agreement.

Land was limited so as to pass from A. to B. on A.'s becoming bankrupt. B. claimed the land, and pleaded that A. had become *insolvent*. In olden time, this would have been bad on special demurrer

A policy of life assurance by its express terms becomes void "if the assured shall die by his own hand." Do not plead that "the assured killed himself," or that he "committed suicide." Plead in the very words of the policy, "the assured died by his own hand."

See *Borradaile v Hunter*, 5 Man. & Gr. 639.

A policy of life assurance contained a condition that satisfactory proof of the title of the claimant, and of the age and death of the assured, must be given to the directors. The company is now sued on the policy, and relies on the fact that this condition has not been complied with. Set out the condition, and then aver that "no satisfactory proof of the title of the plaintiff or of the age of the deceased has ever been given to the directors of the defendant company." Do not plead, as was once done, that "no evidence satisfactory to the defendant company, either of the date of the birth of the assured, or the plaintiff's right to receive the sum assured, has ever been afforded or supplied by the plaintiff, though he has been often requested by the defendant company so to do." Such a change of phrase is unnecessary and confusing.

Facts should be alleged as facts Use terse, short, curt, blunt sentences, all in the indicative mood Be positive. Do not beat about the bush Go straight to the point. If you mean to allege a particular fact, state it boldly, plainly, clearly, and concisely. Avoid all "ifs," and all introductory averments Avoid all periphrasis, all circumlocution A pleading is not the place for fine writing, but simply for hard, downright, business-like assertion.

Avoid, too, the passive voice always use the most direct and straightforward construction, and that, as a rule, will be the active voice. It is simpler and clearer to say, "He repaid the money on June 24th, 1908," than to say, "The money was repaid by him on that date"

Above all, avoid participial phrases; never say that the defendant, being so-and-so, did something. Make two

sentences of it; say that he was so-and-so, and then that he did something. Avoid all clauses that are introduced by "being" or "having." If a fact is material, it should be stated as a positive fact, and in a separate sentence.

Then, again, it always conduces to clearness to observe the strict order of time. In any case not of the simplest, dates are of the greatest importance. The only way to tell a long or complicated story clearly and intelligibly is to keep to strict chronological order.

Illustrations

It is wholly unnecessary to plead —

"The defendant says that he does not admit that the goods referred to in paragraph 3 of the Statement of Claim, and therein alleged to have been delivered by the plaintiff to the defendant, or any of them, were in fact so delivered, and he puts the plaintiff to the proof of such delivery."

Omit all preamble, and plunge at once *in medias res*. Plead simply—

"The plaintiff never delivered any of the said goods to the defendant."

Again, it is quite unnecessary to preface any plea with saving clauses, such as, "In the alternative," or "The defendant without waiving any other ground of defence says that, &c." It is quite unnecessary too to apologise for the line of defence which you adopt or to explain why you think fit to adopt it.

Here is a badly drawn Statement of Claim. —

"The defendant is indebted to the plaintiff, as executor of Lavinia Jones, deceased, in the sum of 231*l.* 5*s.* 10*d.*, being the balance still owing of a sum of 700*l.* advanced to the defendant by the said Lavinia Jones in her lifetime, repayable on demand, with interest at 5 per cent. per annum."

It is all one sentence, and the facts are stated in inverse order of date. Surely the following is clearer —

- "1 Lavinia Jones, deceased, on May 15th, 1905, lent the defendant 700*l.* He agreed to repay her the sum on demand, with interest at the rate of 5 per cent. per annum, payable quarterly.
- "2. During her lifetime he regularly paid her interest at the said rate when and as it became due. He also repaid her 468*l.* 14*s.* 2*d.* towards the principal.
- "3. Lavinia Jones died on December 21st, 1908, having by her last will appointed the plaintiff her executor.

- “4. The plaintiff, as such executor, claims the balance, 231*l.* 5*s.* 10*d.*, with interest thereon at the said rate from September 29th, 1908, to date of writ ”

Form No 5 in sect. v of Appendix C to the Rules of the Supreme Court of 1883 appears to me to offend against the rule just laid down. It begins as follows —

“The plaintiff has suffered damage by breach of contract by bill of lading of goods shipped by the plaintiff, signed by the master of the ship *Mary*, as the defendant's agent, dated the 1st of January, 1899.”

Here there are three distinct allegations depending on participles, and it appears to be left to implication that the defendant is the owner of the ship. Would it not be far better to allege —

- “1. On January 1st, 1899, the plaintiff caused 200 quarters of wheat to be shipped on board the defendant's ship *Mary*, at Bilbao
 “2. The master of the said ship received the same to be carried to London upon the terms stated in a bill of lading, which he then signed and of which the following clauses are material.” [*Here state the clauses sued on, and continue as in paragraph 2 of the said form.*]

This, then, is the *first* essential of good pleading—to be *clear*. The next is to be *brief*. The rules of 1883 repeatedly insist on the necessity of brevity.

The fundamental rule cited at the head of this chapter requires that “every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies ”

“Such statement shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same ” (Order XIX. r. 2)

“The forms in Appendices C., D., and E., when applicable, and where they are not applicable, forms of the like character as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient, any longer forms shall be deemed prolix, and the costs occasioned by such

prolixity shall be disallowed to or borne by the party so using the same, as the case may be " (Order XIX. r. 5)

Yet, as we have seen (*ante*, p 94), each party must state his whole case, he cannot, strictly, prove at the trial any material fact which is not alleged in his pleading. (*Per* Sir J. Hannen, in *The Hardwick*, 9 P. D. 32, and see *Brook v. Brook*, 12 P. D. 19.) How, then, is the necessary brevity to be attained?

In two ways —

- I By omitting every unnecessary allegation.
- II By omitting all unnecessary detail when alleging material facts.

I. It is bad pleading to insert a single unnecessary allegation.

Illustrations.

Neither party should cite public Acts of Parliament, nor private Acts since 1850, or state in his pleading the propositions of law which he proposes to urge upon the Court.

Neither party may plead the evidence by which he proposes to prove the facts on which he relies

Order XIX. r. 4.

Neither party may plead to any matter which is not alleged against him.

Rassam v Budge, (1893) 1 Q. B. 571; 62 L. J. Q. B. 312; 41

W. R. 377, 68 L. T. 717

Powers v. Cook, 1 Ld. Raym. 63, 1 Salk 298, *ante*, p. 98.

Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side.

Order XIX. r. 25, *ante*, p. 98.

Neither party need allege the performance of any condition precedent; such an averment is now implied in every pleading.

Order XIX. r. 14, *ante*, p. 101.

Neither party need set out the whole or any part of any document,

unless its precise words are material. It is sufficient to state its effect as briefly as possible.

Order XIX. r. 21.

It is not necessary for any defendant to plead any denial or defence as to damages claimed or their amount, they will be deemed to be put in issue in all cases, unless expressly admitted.

Order XXI. r. 4.

It is unnecessary for either party to plead any matter, or to plead to any matter, which merely affects costs.

It is unnecessary for either party to plead to his opponent's prayer or claim, or to his particulars, or to any matter introduced by a *videlicet*. He need only deal with the allegations contained in the body of the preceding pleading.

Neither party need refer in his pleading to any item for which his opponent has given him credit

It is unnecessary for either party in his pleading to refer to any interlocutory proceeding in the action, or to recount the history of the case since writ.

It is not necessary for either party to plead any fact which is not yet material to his case; though he may reasonably suppose that it may become material at a later stage. (*Ante*, p. 96)

Neither party should plead to any matter of law set out in his opponent's pleading. This may be treated as mere surplusage.

Richardson v. Mayor of Orford, 2 H Bl. 182; *post*, p. 150.

II. When pleading material facts, all unnecessary details should be omitted

A certain amount of detail is essential to ensure clearness and precision "Although pleadings must now be concise, they must also be precise." (*Per* Kay, J, in *Townsend v. Parton*, 30 W.R. 287; 45 L. T. 756.) Indeed, Order XIX. r. 6, expressly requires that in all cases "in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items, if necessary) shall be stated in the pleading," unless the particulars be of debt, expenses, or damages, and exceed three folios (216 words or figures). But this rule does not state what particulars are necessary, or what degree of particularity is expected of the

pleader Nor does any other rule give us this information. Hence, by virtue of Order LXXII r. 2, the former procedure and practice applies, though it is necessarily qualified to some extent by the important alterations made by the Judicature Act. Under the old system of pleading there was much learning on this matter of "certainty," as it was called, and so much of it as appears likely to be of use to beginners in the art of pleading under the present system will be found in the next chapt

CHAPTER IX

CERTAINTY

MATERIAL facts must be alleged with certainty. The object of pleadings is to ascertain definitely what is the question at issue between the parties, and this object can only be attained when each party states his case with precision. If vague and general statements were allowed, nothing would be defined, the issue would be "enlarged," as it is called, and neither party would know, when the case came on for trial, what was the real point to be discussed and decided. (*Per* Jessel, M R , in *Thorp v. Holdsworth*, 3 Ch D at p 639) On the other hand, a party who pleads with unnecessary particularity may thereby fetter his hand at the trial (as in *James v Smith*, (1891) 1 Ch 384), and lay on himself an increased burden of proof (as in *West v Baxendale*, 9 C B. 141)

The amount of detail necessary to ensure precision naturally varies with the nature of each case. The only general rule that can be laid down is this—that there must be particularity sufficient to apprise the Court and the other party of the exact nature of the question to be tried. "What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they will have to meet when the case comes on for trial." (*Per* Cotton, L J , in *Philipps v Philipps*, 4 Q B D. at p 139.)

The pleader, then, must decide for himself how far it is necessary for him to set out items and to go into figures; how far details of time and place and other surrounding circumstances are necessary to make his pleading intelligible and precise. Experience will teach him this; even common sense without experience will help him much; for our law is rapidly degenerating into common sense!

Perhaps the best test is this After you have drafted your pleading, banish your instructions from your mind for a moment, and imagine yourself a stranger coming fresh to the matter. Would your draft, read by itself, convey to his mind a clear conception of your client's case? If not, you must make your draft more definite and this object will often be best attained by omitting half of it Length does not conduce to perspicuity Half a dozen neat, short sentences, each clear in itself, will tell your story best

And note this distinction If you omit a material fact altogether from your pleading, this slip may lose the case for your client, as in *Collette v Goode*, 7 Ch D 842, and *Byrd v Nunn*, 5 Ch D 781, 7 Ch D. 284. If you plead the fact, but with insufficient detail, the worse that can happen is that your opponent may obtain an order for particulars, the cost of which, however, you may have to pay

Illustrations.

Where the plaintiff claims a specific sum of money as the total amount due to him on an account containing many items, the plaintiff must give particulars showing how that figure is arrived at. Such particulars should be stated in the pleading if they do not exceed three folios, if they exceed three folios, this fact should be stated in the pleading, and particulars must be delivered separately, or a reference made to some bill or account already delivered.

Order XIX. r. 6.

Philapps v. Philapps, 4 Q. B. D. p. 131.

Gunn v. Tucker, 7 Times L. R. 280.

So if a plaintiff in his Statement of Claim gives the defendant credit for a certain amount, and claims to recover the balance, he must not merely name a lump sum, but state the dates and items of the amounts credited. For without this information the defendant cannot tell whether

it is necessary for him to plead payment or set-off, or to counterclaim for the sums which he has paid the plaintiff.

Godden v. Corsten, 5 C. P. D. 17, 49 L. J. C. P. 112, 28 W. R. 305, 41 L. T. 527.

Similarly, a mortgagee in possession who admits that he has received certain sums on account must give particulars of all sums received.

Kemp v. Goldberg, 36 Ch. D. 505; 36 W. R. 278; 56 L. T. 736.

But if a general account is claimed, and the Court sees that such an account must be taken, then no such particulars need be given.

Augustinus v. Nerinx, 16 Ch. D. 13, 29 W. R. 225.

Blackie v. Osmaston, 28 Ch. D. 119, 54 L. J. Ch. 473; 33 W. R. 158, 52 L. T. 6.

Carr v. Anderson, 18 Times L. R. 206

Where an agreement is alleged its date should be given, it should also, as a rule, be stated whether it was made verbally or in writing, and if in writing whether under seal. But a party who alleges a verbal agreement will not be ordered to state in whose presence it was made, as this would be compelling him to name his witnesses.

Turquand v. Fearon, 48 L. J. Q. B. 703, 40 L. T. 543.

Eade v. Jacobs, 3 Ex. D. 335, 47 L. J. Ex. 74; 37 L. T. 621.

In an action for false and fraudulent misrepresentation the Statement of Claim should state whether the alleged representations were oral or in writing, and when and where each of them was made.

Seligmann v. Young, (1884) W. N. 93.

In an action of slander the plaintiff must state when and to whom (and in some cases, where) each slander was uttered.

Roselle v. Buchanan, 16 Q. B. D. 656; 55 L. J. Q. B. 376; 34 W. R. 488; 2 Times L. R. 367.

Roche v. Meyler, (1896) 2 Ir. R. 35.

Time.

In an action on any negotiable instrument, its date and amount and the parties thereto should be stated

Walker v. Hicks, 3 Q. B. D. 8, 47 L. J. Q. B. 27, 37 L. T. 529.

In an action for goods sold and delivered, the date and amount of each consignment should be stated.

Parpate Frères v. Dickinson, 26 W. R. 479, 38 L. T. 178.

If A.'s sheep stray on to B.'s land, B. may distrain them as *damage feasant*, and put them into any pound within the hundred which is in a proper condition to receive them. He must not place them in the common pound if it be unfit, even though such unfitness be caused by

accidental circumstances, such as recent rain or snow. And in an action by A. against B for abusing the distress, by putting the animals into a small, wet, or muddy pound, it will be of no avail for B to plead that it was the manor pound, and that it was generally in a proper state to receive such animals he must plead that it was in a proper condition at the time of impounding

Wilder v. Speer, 8 A. & E 547.

Bignell v. Clarke, 5 H. & N. 485, 29 L. J. Ex. 257; 2 L. T. 189

Coaker v Willcocks, (1911) 2 K. B. 124, 104 L T 769.

In an action brought by a lessor against a lessee during the continuance of the term for breach of a covenant to repair, the Statement of Claim must state the time which the term still has to run; for on this depends the value of the lessor's reversion

Turner v. Lamb, 14 M & W. 412.

Murphy v. Murphy, (1903) 2 Ir R 329.

So a claim for rent must state the dates at which the rent claimed fell due.

Beaufort v. Ledwith, (1894) 2 Ir R. 16.

Where the defendant has pleaded the Statute of Limitations, or any other defence of waiver by laches, dates are most material.

See App D. sect VI., Nuisance, 4

Reeves v. Butcher, (1891) 2 Q. B 509, 60 L. J. Q. B. 619.

If in trespass to land the defendant pleads that the *locus in quo* was his freehold, he must allege that it was his freehold "at the time of the alleged trespass", otherwise the plea is insufficient.

Com. Dig. Pleader (E. 5).

As to duration of time, it is generally sufficient to aver that the work was done, or that some event happened, "within a reasonable time in that behalf"

Action of replevin for seventy cocks of wheat which the defendant had distrained for rent in arrear while they were standing on a field called "Seven Acres," portion of the demised premises The plaintiff pleaded that he suffered the wheat to grow until it was ripe and ready to be cut, and then cut it and suffered it "to lie on the said 'Seven Acres' until the same in the course of husbandry was fit to be carried away; and that while it was so lying the defendant, of his own wrong, took and distrained the same under pretence of a distress, the said wheat not then being fit to be carried away according to the course of husbandry, &c" The defendant urged among other objections to this plea, that it ought to have been particularly shown therein how long the wheat remained on the land after cutting, that the Court might judge whether it were a reasonable time or not. But the Court decided against the objection

"It is absurd to say that in the present case the Court must judge of the reasonableness; for if so it ought to have been set forth in the plea not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other instances which would be ridiculous to be inserted in a plea. We are of opinion, therefore, that this matter is sufficiently averred."

Eaton v. Southby, Willes, 131.

Elliott v. Hardy, 3 Bing. 61, 10 Moore, 347.

Place

In an action for the recovery of land the property must be described with sufficient certainty to enable the sheriff to put the plaintiff in possession of it, if he succeed in the action.

In an action of trespass the plaintiff should describe the close on which the defendant trespassed so as to identify it

In an action of replevin the place where the cattle or goods were distrained is material

3 Chitty on Pleading (7th ed.), 291.

In alleging a right of way the *termini* of the way should be stated

Harris v. Jenkins, 22 Ch. D. 481; 52 L. J. Ch 437, 31 W. R. 137, 47 L. T. 570.

Rouse v. Bardin, 1 H. Bl. 351.

Simmons v. Lillystone, 8 Ex. 431, 22 L. J. Ex 217.

There was formerly a special reason for requiring that the place where the property claimed was situated, or where any wrongful act was committed, should be stated with great precision in the declaration. This was necessary in order to enable the sheriff to summon the jury from the proper *venue*. Formerly, every issue of fact had to be tried by a jury summoned from the place or neighbourhood where the facts occurred, or, as it was then called, the *venue* or *visne* (*vicinetum*, neighbourhood). At first the jury was always summoned from the hundred in which the facts happened; and when that was no longer necessary, certain actions, which were called *local* as distinguished from *transitory* actions, still had to be tried in the county in which the realty, &c was situated. But in 1875 all local venues were abolished (*Buckley v. Hull Docks Co.*, (1893) 2 Q. B. 93). And now certainty of place is only necessary to give reasonable clearness and precision to the statement of facts, the Master in every action fixes the place of trial (Order XXXVI 1 1)

Damages.

No particulars will be required of general damage. for this the law presumes in the plaintiff's favour. But special damage must be alleged

with sufficient particularity to inform the defendant of the nature and extent of the loss sustained. And the plaintiff will not be allowed to give evidence of any special damage which is not claimed explicitly, for the defendant cannot be supposed to have anticipated, or to be aware of, such damage. See pp 201, 202. If ambiguous expressions be used in the Statement of Claim which may or may not amount to an allegation of special damage, the Master will order "particulars of special damage, if any claimed"; and the plaintiff must then give particulars, or say definitely that he does not claim any special damage

Title.

Where either party claims to be the owner of any property, real or personal, or of any right or interest to, in, or over it, he must state his title to such property, right, or interest, with all due particularity "The pleadings must show title"

But very different degrees of particularity are necessary in different cases. In the first place, our law always respects possession. Possession is a physical fact, and generally an obvious one, it is wholly distinct from ownership, which is often a difficult question of law. The true owner of a field or of a chattel may be in possession of it, or he may not. Again, he may be rightfully out of possession, as where he has let it to a tenant, or lent it to a friend; or he may be wrongfully out of possession, as where he has been evicted by a trespasser from the field, or where the chattel has been stolen.

A man may be said to be in possession of land or of a chattel whenever he has full and uncontrolled physical dominion over it. Thus, he is in possession of a house when he or his servants are living in it, if he or they are absent from it, he would still be held to be in possession, if such absence was only temporary, or if he could return and re-enter at any moment, if he chose, without asking anyone's permission, and without any preliminary ceremony. But the moment anyone else enters into and remains on the premises without his consent, the former possessor is ousted, for two

persons cannot be in possession of the same property at the same time (unless they be partners or joint occupiers)

I. *Where the person showing title is in possession or was in possession at the date of the wrong complained of*

As against a wrong-doer, it is always sufficient to allege a merely possessory title. (*Armory v Delamirie*, 1 Smith's Leading Cases (11th ed), p. 356) Thus, in trover, detinue, or trespass to goods it is sufficient to describe them as "the goods and chattels of the plaintiff", in trespass to land it is sufficient to describe the *locus in quo* as the "close of the plaintiff," or to allege that "the plaintiff was lawfully possessed of a certain close," describing it. So, with respect to incorporeal hereditaments, it is sufficient to allege that the plaintiff was possessed of the corporeal thing in respect of which the right is claimed, *e g* , "the plaintiff was possessed of a certain messuage" (stating its name and situation), "and that by reason thereof he was entitled to common of pasture," or to a right of way, &c

Illustrations.

In an action of trespass it is sufficient to allege that the defendant broke and entered certain land of the plaintiff, called, &c. (describing it).

In an action of trover it is sufficient to say that the defendant converted to his own use the plaintiff's goods (specifying them).

In an action of detinue it is sufficient to allege that the defendant detained from the plaintiff his title deeds of, &c (describing the land).

In an action for obstructing a right of way it is sufficient to allege that the plaintiff was possessed of a certain messuage, the occupiers whereof had from time immemorial (*or* for so many years before suit) enjoyed as of right and without interruption a way from the said messuage across a certain close called Blackacre to a public highway, and back again from the said public highway over the said close to the said messuage, for themselves and their servants, on foot and with horses, cattle and carriages, at all times of the year

See 2 & 3 Will IV. c. 71, and C. L P Act, 1852, Sched. B. 46, 47.

As to pleading a prescriptive right at common law to an easement, or to any profit or benefit taken or arising out of land, see 2 Wms. Saunders,

401, a; *Attorney-General v Gauntlett*, 3 Y & J 93; Bullen & Leake, 3rd ed p. 713; 5th ed p. 864

As to pleading a period of prescription under the Act, see sect 5 of the 2 & 3 Will. IV. c. 71, and Bullen & Leake, 3rd ed. p. 711, 5th ed. p. 861.

A defendant who is in possession of land may rely on that fact and nothing else; he need not state what particular estate or interest he claims in the property. This privilege is preserved to him by the express words of Order XXI r. 21 "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's Statement of Claim. He may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned." (Sec *post*, pp 218, 219)

A defendant who is in possession of a chattel is in a somewhat different position. he may, if he think fit, content himself with denying that the goods are the plaintiff's, and so put him to proof of his title. But if the defendant claims any right to the possession of the chattel apart from ownership, this should be specially pleaded, otherwise, as soon as the plaintiff proves his title, the right to the possession of his own property (which is always inherent in ownership) will at once attach and displace the *primâ facie* title which the defendant derived from its possession. A plaintiff who has proved his title to the property is not a wrongdoer, and mere possession will not avail against him.

Illustrations.

In an action for the recovery of land, the defendant in possession need not plead that the plaintiff's ancestor demised the land to the defendant

for a term of years, or conveyed it to him by way of mortgage or sale. But he must plead, if such be the case, that the plaintiff's ancestor *agreed* to demise, mortgage, or sell the property to the defendant; for this, in the absence of any formal document transferring a legal estate or interest to the defendant, would be an equitable defence.

In an action for the recovery of a chattel, the defendant must plead specially that it was hired out to him for a definite period not yet expired, or lent to him for a purpose not yet accomplished, or pawned to him, or that he has a lien on it for warehouse rent, or any other lien. For such defences admit the plaintiff's title to the ownership of the goods, and should therefore be specially pleaded by way of confession and avoidance.

But neither in an action for the recovery of land nor of a chattel is it necessary for the defendant to plead that the plaintiff's ancestor by his marriage settlement vested the property in certain trustees, not parties to the action, in whom the legal estate still remains. For that is a flaw in the plaintiff's case which it is always open to a defendant in possession to point out and rely on under a plea of possession or a mere traverse of the plaintiff's title.

Possession is *prima facie* seisin against a wrongdoer, and any one who enters on land which is in the possession of another, against the will of that other, is deemed a wrongdoer till he pleads and establishes his title to the land, or to a right of way over it. If therefore in an action of trespass for assault and battery, the defendant justifies on the ground that the plaintiff wrongfully entered his house, and was making a disturbance there, and that the defendant gently removed him, the plea should be in this form: "the defendant was lawfully possessed of a certain dwelling-house, &c; and while he was so possessed, the plaintiff was unlawfully in the said dwelling-house," &c. It is not necessary for the defendant to show any title to the house, beyond this of mere possession.

3 Chitt Pl. (7th ed.) 323.

So in an action of trespass for seizing cattle, if the defendant justifies on the ground that the cattle were damage feasant on his close, it is not necessary for him to show any title to his close, except that of mere possession.

1 Wms. Saund. 221, n. (1), 346, 2 Wms. Saund. 285, n. (3),
Bac. Ab. Trespass (5th ed.), 613.

Where it is sufficient to allege such a mere possessory title, it is a mistake to go into details as to the precise estate of either party.

See *Cudlip v. Rundle*, Carthew, 202.

Sir Francis Leke's Case, 3 Dyer, 365, 2 Wms. Saund. 206, a. (22).
Bristow v. Wright, Douglas, 665.

·II *Where the party pleading is out of possession and his opponent is in possession*

Here, if the party pleading claims either to be the owner of the property or to possess a right to the immediate possession thereof, he must state his title clearly.

This is easy enough where the party pleading claims the absolute present fee simple. In that case he need say no more than that he "is seised in fee of the close or tenement" (describing it). He need not show the derivation or commencement of his estate; for if he were required to show from whom he derived his title, he might, on the same principle, be required to show from whom that person derived *his*, and so back *ad infinitum*.

There is, however, one exception to this rule, where in the same pleading it has already been alleged that the fee was in some other person, the party pleading must show how the fee passed from such other person to himself.

Illustrations.

If A be seised in fee, it is sufficient to allege this simply, without showing when, or how, or from whom he derived it.

Co. Litt. 303 b.

Though A.'s fee was conditional on an event which has happened, or be determinable in a certain event which has not happened, he may allege a present absolute fee without qualification, and without showing its commencement.

Seymour's Case, 10 Rep. 98; *Doctrina Placitandi*, 287.

An averment that A. was seised in fee will be taken to mean that he was *solely* seised, in the absence of anything to the contrary.

Gilbert v. Parker, 2 Salk. 629

Bonner v. Walker, Cro. Eliz. 524

An action for the breach of a covenant, contained in a lease granted by J. S. to the defendant, was brought by the heir of J. S. after his death. The plaintiff having alleged that J. S. was seised in fee when he granted the lease, must proceed to show how the fee passed to himself, viz., by descent.

Cuthbertson v. Irving, 4 Hurl. & N. 742, 6 Hurl. & N. 135.

But where the party pleading has only an estate in tail, or for life, or for years, or any other *particular estate* (as distinct from an estate in fee simple), or where his estate in fee simple is not yet in possession but is an estate in reversion or remainder, there such title must be fully and particularly alleged. The pleading should state —

- (i.) The *tenure* (if no other tenure be alleged it will be assumed to be free and common socage)
- (ii.) The *quantity of estate*, whether an estate tail or for life, or *pur autre vie*, or widowhood, or merely a leasehold interest, and for what term.
- (iii.) The period of enjoyment. (Dates are always most material in any case of disputed title, and the commencement of any particular estate must be shown.)
- (iv.) The number of owners, if more than one, at any stage of the story, and whether joint tenants or tenants in common or coparceners.
- (v.) The manner of acquisition or devolution. The pleading must show who granted the plaintiff his estate in tail or for life, or who granted the lease which he now holds and to whom. All the steps in the title must be given, and the general nature of the instrument must be stated: *e g.*, whether the estate or interest passed by deed or will, or by descent on an intestacy.

There was formerly one case in which a defendant was permitted to state his title in a more general way. In a plea to an action of trespass to land, if the defendant claimed an estate of freehold in the *locus in quo*, he was allowed to plead generally "that at the time of the alleged trespass, &c, the said close was the close, soil and freehold of the defendant." This was called the plea of *liberum tenementum*. But I do not think this would be allowed under the present rules. The plaintiff is in possession, the defendant is setting up a title adverse to his, is in fact a claimant on this issue. Hence I think the principle of the decision

in *Philipps v Philipps*, *infra*, would apply, and that the defendant would be compelled to state whether he claimed the fee simple or some lesser estate, and in the latter case to state when, and how, and by whom, such estate was created

This allegation of a general freehold title was formerly sustained by proof of any estate of freehold—whether in fee, in tail, or for life only, and whether in possession, or expectant on the determination of a term of years. But it did not apply to the case of a freehold estate in remainder or reversion expectant on a particular estate of freehold or of copyhold tenure. Where the close was the defendant's freehold, but the plaintiff was in possession under a lease for years, and the defendant pleaded *liberum tenementum*, it was held that the plaintiff must plead the lease for years specially in confession and avoidance in his Reply. The existence of the lease was no ground for traversing the plea of *liberum tenementum*; it was consistent with the fact that the defendant was the freeholder, indeed, if the defendant himself granted the lease, its validity would depend on that very fact. (See 5 Hen VII 10 a, pl. 2; *post*, p 253, *Doe v. Wright*, 10 A. & E 763, *Ryan v. Clark*, 14 Q. B. 65.)

Illustrations.

In an action for the recovery of land of which the plaintiff has never been in possession, the Statement of Claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims; and a general statement, that by assurances, wills, documents and Crown grants in the possession of the defendants, without further describing them, the plaintiff is entitled to the land, is embarrassing, and liable to be struck out under Order XIX. r. 27.

Philipps v. Philipps, 4 Q. B. D. 127; 48 L. J. Q. B. 135; 27 W. R. 436; 39 L. T. 556.

If a lease be granted by J. S. to the defendant, and the plaintiff, claiming as assignee of the reversion, sue the lessee on the covenant therein contained for rent, he must precisely state the conveyances, or other transfers of title from J. S. to himself, whereby he became entitled to the reversion. To say generally that the reversion came to him by assignment will not be sufficient without circumstantially alleging all the

mesne assignments. The devolution of the estate to the plaintiff must be shown.

1 Wms. Saund. 112, n (1).

Cuthbertson v. Irving, 4 Hurl. & N. 742.

Davis v. James, 26 Ch. D. 778, 53 L. J. Ch. 523, 50 L. T. 115

Where a plaintiff claims as assignee of a debt originally contracted between the defendant and A., he must show in the body of his pleading how he derives his title; he must allege an absolute assignment in writing, and that notice in writing of such assignment was given to the defendant before action, otherwise this plaintiff would not be entitled to sue, at all events without joining A. as a co-plaintiff. (Jud Act, 1873, s. 25, sub-s. 6.)

Seear v. Lawson, 16 Ch. D. 121, 50 L. J. Ch. 139; 29 W. R. 109.

Read v. Brown, 22 Q. B. D. 128, 58 L. J. Q. B. 120; 37 W. R. 131; 60 L. T. 250.

Bradley v. Chamberlyn, (1893) 1 Q. B. pp 441, 442.

Bennett v. White, (1910) 2 K. B. 643; 79 L. J. K. B. 1133, 103 L. T. 52.

Where a party claims by inheritance as heir of J. S., he must show how he is heir; e.g., he must state whether he was J. S.'s son, and account for his elder brothers, if there were any; if he was J. S.'s nephew, this must be stated, and the pedigree pleaded sufficiently to show how he is nephew, and that he is heir. (See *ante*, p. 89.)

Dumsday v. Hughes, 3 Bos & Pul. 453.

Roe v. Lord, 2 Blackstone, 1099.

Palmer v. Palmer, (1892) 1 Q. B. 319, 61 L. J. Q. B. 236

With respect to all particular estates, the general rule is, that their commencement must be shown. If, therefore, a party sets up in his own favour an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement, that is, he must show its creation by the last person seised in fee simple in possession, and each subsequent devolution till such title vests in himself, stating the nature and effect of each transfer or conveyance.

Co. Litt. 303 b, 1 Wms. Saund. 187, n. (1).

Scally v. Dally, 2 Salk. 562.

Johns v. Whitley, 3 Wils. 65, 72.

Hendy v. Stephenson, 10 East, 60.

Pinhorn v. Souster, 8 Ex. 138; 22 L. J. Ex. 18.

The commencement of a copyhold estate must be shown, even though it be copyhold of inheritance, for the fee simple is in the lord. But it is only necessary to go back to the admittance of the last heir or surrenderee;

for his admittance is considered as in the nature of a grant from the lord and may be so pleaded.

Pyster v Hemling, Cro. Jac. 103

Brown's Case, 4 Rep. 22 h.

Shepherd's Case, Cro. Car 190.

But where an estate has been already laid in another copyholder from whom the party pleading claims, and it becomes necessary, therefore, to show how the estate passed from one to the other, the conveyances between the copyhold tenants by surrender and the admittance by the lord, &c., must then be set forth according to the fact.

See the forms, 2 Chitt. Pl. (7th ed.) 423.

Title by Estoppel. ✓

There is one case in which this particularity is unnecessary. No title need be shown at all where the opposite party is estopped from denying the title.

Thus, if a lessor sue the original lessee, or anyone who has attorned tenant to the lessor, on the covenants of the lease, he need allege no title to the premises demised, because a tenant is estopped from denying his landlord's title. But the tenant is not bound to admit title to any extent greater than would authorize the lease. Hence, if the action be brought not by the lessor himself but by his heir, executor, or other representative or assignee, the title of the lessor must be alleged, in order to show that the reversion is now legally vested in the plaintiff in the character in which he sues. (See *Cuthbertson v. Irving*, 4 Hurl. & N. 742; 6 Hurl. & N. 135 (in error), *Thruscutt v Martin*, 3 Ex 454, and the judgment of Willes, J., in *Smith v Scott*, 6 C. B. N. S. 771.) So if the plaintiff sue as heir, he must allege that the lessor was seised in fee, for the tenant is not bound to admit that his lessor was seised in fee, and, unless he was so, the plaintiff cannot claim as heir. The lessor may have been only a tenant for life, and a tenant is not estopped from saying that his landlord's title is determined, or from saying that he paid rent to

the plaintiff, not as his landlord, but as collector for his landlord (*Jones v. Stone*, (1894) A. C. 122.)

Pleading Title in Another.

So far we have dealt with the case where the party pleading alleges title in himself. The same rules apply with equal strictness where the party pleading sets up title in some third person, from whom he says he derived the authority to do the act complained of. For instance, where a servant exercises a right of way by his master's order, the right must be pleaded with the same particularity as if the master whose authority he pleads had been made a defendant.

Next, we must consider the case where a party alleges title in his adversary, with the object of making him liable in respect of the property, real or personal

In this case it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim. The reason of this difference is, that a party may be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own (See *Rider v. Smith*, 3 T. R. 766, *Derisley v Custance*, 4 T. R. 75; *Attorney-General v. Meller*, Hardr 459.) "It lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than of the lessee who is a stranger to it" (*Robert Bradshaw's Case*, 9 Rep. 60 b, *ante*, p. 108; and see *Cudlip v. Rundle*, Carth. 202.)

In order to show a liability in the party charged, according to the rule here given, it is in most cases sufficient to allege that your adversary is in possession, and to prove that he has some present interest in chattels, or is in actual possession of land. But this form of pleading is *ex hypothesi* inapplicable if the interest he possesses be by way of reversion or remainder. In that event the party pleading must state his opponent's title in detail. Then, again, there are cases in

which to charge a party with mere possession would not be sufficient to show his liability. Thus, if the defendant be sued as assignee of a term of years for arrears of rent due under a covenant in the lease creating that term, it is not sufficient to show that he is in possession of the property demised, but it must be further shown that he is in possession as assignee of the term. But even here the party pleading is not expected to plead all the details of the various assignments of the term, though he must show all the assignments of the reversion, for these are within his knowledge.

Illustrations

In an action of debt, where the defendant is sued for rent as the assignee of the term after several mesne assignments, it is sufficient, after stating the original demise, to allege that "after making the said indenture, and during the term thereby granted, all the estate and interest of the said E. F." (the original lessee) "of and in the said demised premises by assignment came to and vested in the defendant," without further showing the nature of the mesne assignments. For the plaintiff is a stranger to the defendant's title, and therefore cannot set it out more particularly.

Cotes v. Wade, 1 Lev. 190, 1 Sid. 298.

1 Wms. Saund 112 (b), n. (4).

Derisley v. Custance, 4 T. R. 75.

Upon the same principle, if title be laid in an adversary by descent—as, for example, where an action of debt is brought against an heir, on the bond of his ancestor—it is sufficient to charge him as an heir, without showing how he is heir, viz., as son or otherwise; though where a party seeks to entitle himself by inheritance, the mode of descent must be alleged, as we have seen *ante*, pp 128, 129.

Denham v. Stephenson, 1 Salk. 355.

Pleading Authority.

Whenever the party pleading seeks to justify an act *prima facie* unlawful, he must show his authority or excuse with precision. If he seeks to justify it by virtue of any writ, warrant, precept, or other authority, he must set it forth particularly in his pleading. If he plead that he did the act by

the command of A., he must further show that A. had legal right and title so to command. If the plaintiff is in possession of any land or goods, or can otherwise make out a *prima facie* title to them, it is not enough for the defendant to show a better title in some third person, he must also show that he acted as agent for such third person at the time he did the act complained of. (Or, in the language of the defunct pleaders, a defendant cannot set up a *jus tertii*, unless he also plead authority.)

Illustrations.

If you trespass on land of which I am in possession, it is immaterial that the land really belongs to A., unless you claim through or under A., or acted by his authority

If I deposit goods with a warehouseman, and he subsequently refuses to deliver them up to me, it is not enough for him to plead that they belong to B. (for he received them from me), he must go further, and plead that he refused to redeliver them, relying upon the title and by the authority of B.

Thorne v. Tilbury, 3 H. & N. 534; 27 L. J. Ex. 407.

Biddle v. Bond, 6 B. & S. 225; 34 L. J. Q. B. 137.

Ex parte Davies, 19 Ch. D. 86, 30 W. R. 237; 45 L. T. 632

The bailee of goods cannot avail himself of the title of a third person to the goods as a defence to an action of detinue by the bailor, except by further showing that he is defending the action on behalf and by the authority of such third person.

Rogers v. Lambert, (1891) 1 Q. B. 318; 60 L. J. Q. B. 187; 39 W. R. 114, 64 L. T. 406.

Henderson v. Williams, (1895) 1 Q. B. 521, 64 L. J. Q. B. 308, 43 W. R. 274, 72 L. T. 98.

In an action brought by a commoner against a stranger for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a licence from the lord to put his cattle there, but he did not aver that there was sufficient common left for the commoners. This was held to be no good plea, for the lord had no right to give a stranger such licence, unless there was enough common left for the commoners.

Smith v. Feverell, 2 Mod. 6, 1 Freeman, 190

With respect to acts valid at common law, but regulated as to the

mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute. See *ante*, p. 99

Anon., 2 Salk 519.

4 Hen. VII. 8, 1 Wms. Saund. 211, n. (2); 276, n. (2)

Birch v. Bellamy, 12 Mod. 540.

Hopley v Tarvin Parish Council (1910), 74 J. P. 209.

But where an act is *prima facie* illegal, all facts necessary to prove its legality must be alleged and proved with great particularity *E.g.*, in an action of replevin (*post*, p. 211), if the defendant justifies taking the cattle by alleging that he was bailiff of a landlord who distrained them for rent, he must show by his plea that the land on which such distress was made was demised at a rent certain, specifying it, and that the rent was in arrear; but he need not set out the lessor's estate or title, or any particulars of the demise, except the rent. So if the defendant justifies seizing a horse as a heriot due to the lord of a manor, he must show that he was the officer of the lord, and authorized to seize heriots for him; that the land on which the horse was seized was parcel of the manor, that the tenant had recently died, and that the heriot was due; but he need not set out the estate or title of the lord of the manor.

11 Geo. II. c. 19, s. 22, and see Precedent, No 98.

But this section does not apply to the case of a distress made by a defendant on whose land the plaintiff's cattle had been straying and doing damage. Hence, in an *avowry for distress damage feasant* (as such a defence was formerly called), the defendant is still bound to justify with full particularity, he must show that the cattle were damaging him, else he would have no right to distrain. But need he plead his exact estate or interest in the land on which the cattle were straying? Surely not if he were in possession. (See *ante*, p. 124.) Here we have a conflict between two rules. And it has been decided that it is not enough for the defendant to plead possession merely; that, if a tenant, he must state the details of his tenancy, &c., if a freeholder, he must plead that the land is his freehold; but that he need not go on to state whether he be seised in fee, in tail, or for life. See Precedent, No. 99.

Per Buller, J., in *Dovaston v. Payne*, 2 H. Bl. 530, 2 Sm. L. C. (11th ed.) 160.

Hawkins v Echles, 2 Bos. & Pul. 359, 361, n. (a).

Bullen & Leake, 3rd edn. at p. 782; 5th edn. at pp. 954, 957.

Where the act complained of was done in the execution of judicial process, it is not sufficient for the defendant to allege generally that he so acted by virtue of a certain writ or warrant directed to him; he must set it forth particularly in

his plea. (1 Wms. Saund 298, n. (8); Co Litt 303 b.). If the party pleading be an officer of the Court, he need not also set out the judgment on which such writ or warrant was founded, for it is his duty to execute the process of the Court without inquiring into the validity or even the existence of the judgment (*Andrews v Marrs*, 1 Q B 3, *Dews v. Riley*, 11 C. B 434) But if the party pleading be not an officer of the Court, he must set out the judgment as well as the writ. (*Per* Holt, C J , in *Britton v Cole*, 1 Ld Raym 305; Carth 443, *Barker v Braham*, 3 Wils 368) If it be the judgment of a superior Court, none of the previous proceedings in that suit need be stated, if it be the judgment of an inferior Court, or, it seems, of a foreign Court, then so much of the previous proceedings must be pleaded as will show jurisdiction in that Court (*e g* , that the cause of action arose within its jurisdiction); and if it be a Court whose jurisdiction is not defined by any public Act of Parliament of which judicial notice will be taken, the nature and extent of its jurisdiction should also be set forth. (*Moravia v Sloper*, Willes, 30; *Morrell v Martin*, 3 M. & Gr. 581)

Illustrations.

The defendant seized the plaintiff's mare on the wastes of the manor of B. The defendant justified his act under a by-law made by the lord of the manor and the homage at a lawful court, which by-law the plaintiff had broken This offence was presented at the next court, and thereupon the defendant, being bailiff of the lord of the said manor, did take the mare for the forfeiture incurred by the plaintiff, &c. The Court held the plea bad, "for the bailiff cannot take a forfeiture *ex officio*. There must be a precept directed to him for that purpose, which he must show in pleading."

Lamb v Mills, 4 Mod. 377.

A plea justifying the arrest and detention of a ship under a judgment *in rem* of a competent Court having jurisdiction in Admiralty, must state what the charge was, and who were parties to it, and at whose instance the order was given, and at what time, and for what object, and whether the defendant was a party to the suit or acted as an officer of the Court

Collett and another v. Lord Keith, 2 East, 260.

In an action of trover for taking a ship, the defendant set up that the Admiralty of a certain port in the East Indies had given sentence against the said ship as a prize. It was held that the plea ought to have shown some special cause for which the ship became a prize, and that the judge who gave sentence should have been named, and the Court described with sufficient certainty to identify it.

Beak v. Tyrrell, Carth. 31.

Charges of Misconduct.

Particularity is especially needed where the pleading contains an imputation on the character of your opponent; as then it is only right and fair that he should know definitely before the trial what is the charge which is made against him. Justice requires you to define the accusation you bring against anyone, and this is a very different thing from setting out the evidence by which you intend to establish it. "The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place." (*Per* Lord Penzance in *Marriner v. Bishop of Bath and Wells*, (1893) P.p. 146.)

Illustrations.

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, particulars (with dates and items, if necessary) shall be stated in the pleading.

Order XIX. r. 6.

The plaintiff alleged that the defendants had made false entries in certain books, he was ordered to give a list of the entries alleged to be false, and also to state generally the nature of his objections to them.

Newport Dry Dock Co. v. Paynter, 34 Ch. D. 88, 56 L. J. Ch. 1021; 55 L. T. 711.

Harbord v. Monk, 38 L. T. 411.

The plaintiff alleged that the defendant had "in various ways misapplied rent and profits of leaseholds, which he had received on behalf of the plaintiff, and had committed breaches of trust." He was ordered to give particulars

Re Anstice, 54 L. J. Ch. 1104; 33 W. R. 557; 52 L. T. 572.

In an action for the price of work and labour done, a defendant was formerly permitted, under a general plea of "never indebted," to prove at the trial that the plaintiff did the work so unskilfully that it was useless to the defendant. This was the proper way of pleading such a defence, and, indeed, if the defendant pleaded in any other way, his plea was struck out and the general issue substituted for it. (*Hill v. Allen*, 2 M. & W. 283.) But now such a defence must be expressly pleaded, and particulars of the alleged defects stated, so as to give the plaintiff notice of the charge that is going to be made against him.

Particulars must always be given of any alleged negligence or contributory negligence.

In an action of defamation, where the defendant justifies, if the libel or slander consists of one specific charge, it is sufficient to allege generally that the words are true, and no further particulars are necessary; the plaintiff knows what the defendant will try and prove against him at the trial. But where a general charge of misconduct is made, and the defendant has justified, specific instances must be given in the Defence, and stated with sufficient particularity to inform the plaintiff precisely what are the facts to be tried, and what is the charge made against him.

Gordon Cumming v. Green and others, 7 Times L. R. 408

Devereux v. Clarke & Co., (1891) 2 Q. B. 582; 60 L. J. Q. B. 773, 7 Times L. R. 714.

Zierenberg and wife v. Labouchere, (1893) 2 Q. B. 183, 63 L. J. Q. B. 89, 41 W. R. 675, 69 L. T. 172

Emden v. Burns, 10 Times L. R. 400

Arnold and Butler v. Bottomley and others, (1908) 2 K. B. 151; 77 L. J. K. B. 584, 98 L. T. 777.

Where the defendant justified an imprisonment of the plaintiff on the ground of a contempt committed *tam factis quam verbis*, the plea was adjudged to be bad, because it set forth the contempt in this general way without showing its nature more particularly.

Collett v. The Bailiffs of Shrewsbury, 2 Leo. 34.

Action for wrongful dismissal. Defence, that the plaintiff did not serve the defendant faithfully, as in the said agreement stipulated. *Per* Bramwell, B., "this is a plea of confession and avoidance, and bad as being too general."

Horton v. McMurtry (1860), 5 H. & N. at p. 671.

When the pleader seeks to avoid the Statute of Limitations by pleading concealed fraud, he must state his case with the utmost particularity, or the pleading may be struck out under Order XXV. r. 4, or under the inherent jurisdiction of the Court.

Riddell v. Earl of Strathmore, 3 Times L. R. 329

Lawrance v. Lord Norreys, 15 App Cas. 210, 59 L. J. Ch. 681; 38 W. R. 753; 62 L. T. 706; 6 Times L. R. 285

Willis v. Earl Howe, (1893) 2 Ch. 545, 62 L. J. Ch. 690, 41 W. R. 433; 69 L. T. 358.

Betjemann v. Betjemann, (1895) 2 Ch. 474; 64 L. J. Ch. 641, 44 W. R. 182, 73 L. T. 2

Bull's Coal Mining Co. v. Osborne, (1899) A. C. 351, 80 L. T. 430.

In re McCallum, (1901) 1 Ch. 143; 70 L. J. Ch. 206, 49 W. R. 129, 83 L. T. 717.

The defendants charged the plaintiffs with "an attempt to mislead the public." North, J., ordered them to give particulars of the way in which they alleged the plaintiffs had attempted to mislead the public

Griffith and others v. Curtis and Harvey (not reported).

Uncertainty.

I conclude with one practical observation Counsel often cannot be as precise as they desire, because they cannot obtain definite information The lay client is abroad, or there is some other reason. Well, where you cannot be exact, make too broad rather than too narrow an allegation. It is better to claim too much than too little. It is wiser to state your client's right too largely, if you cannot state it exactly, as the greater includes the less. Either party will be allowed as a general rule to prove so much of his allegation as is necessary to support his case, although he has alleged more in his pleading, for, in the language of the old pleaders, "pleadings are construed *distributively*"

Illustrations.

If the plaintiff claims 500*l.*, he will be allowed to recover 100*l.* or 200*l.*, though where the items are divisible and arise out of separate facts, he ought to be made to pay the costs occasioned by his joining the items as to which he has failed.

This was not so in Roman law, there, if a defendant could show that the plaintiff had claimed too much, he won the action. The plaintiff had to recover the full sum he claimed or nothing at all, this was called the *exceptio pluri*s. This system had advantages to recommend it, but such strictness would be impossible in these days.

Where the plaintiff alleged that seven quarters' rent were due, and the

evidence showed that only six quarters' rent were due, it was held that the variance was immaterial

Tenny d. Gibbs v Moody, 3 Bing 3, 10 Moore, 252.

In cases of unliquidated damages, be sure you claim enough, as the plaintiff cannot recover more than the sum claimed on his writ or Statement of Claim, even though the jury award him more. But the judge will often in such circumstances amend the figure.

Moderer v. Moderer and Barclay, 10 Times L R. 69.

The Dictator, (1892) P. 64; 61 L. J. P. 72; 66 L. T. 863.

An averment of intention is divisible, so that where a libel is alleged to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of these intentions.

R v Evans (1821), 3 Stark. 35.

If a defendant pleads that he has paid the plaintiff his whole debt, he will be allowed to prove part payment as a defence *pro tanto*, and the plaintiff will recover judgment only for the balance.

If a defendant in an action for the conversion or detention of goods denies that any of the goods are the plaintiff's, he will be allowed to prove at the trial that some of them are not, though he may have to admit that the rest are, the plaintiff's.

Freshney v. Wells, 26 L J. Ex. 228.

If a defendant chooses on his pleading to deny his liability in respect of every item in the plaintiff's claim, he cannot be compelled to give particulars stating which of them he really intends to dispute at the trial.

James v. Radnor County Council, 6 Times L. R. 240

The plaintiff alleged that his vessel had been injured by the defendant's ship running into it *twice* while it was at anchor, and driving it on the rocks. He failed to prove two separate collisions, but he proved one of sufficient force to drive his vessel ashore. Held that he was entitled to recover.

Tyrer v. Henry (1860), 14 Moore, 83.

CHAPTER X.

ANSWERING YOUR OPPONENT'S PLEADING.

So far we have dealt only with the statement by a party of his own case. But after the first pleading each party must do more than state his own case; he must deal with that presented by his opponent.

Now there are only three ways in which a party who means to fight can deal with his opponent's pleading:—

- (i.) He can deny the whole or some essential part of the averments of fact contained in it. This is called *traversing* an opponent's allegations.
- (ii.) He can say, "Well, that is true so far as it goes; but it is only half the truth. Here are several other facts which are omitted from your pleading, and which will put a very different complexion on the case." Alleging such facts is called *pleading by way of confession and avoidance*, or, more shortly, *confessing and avoiding*; because the pleader seems to confess that his opponent's statement discloses a good *primâ facie* case; that it is on the face of it good in law and true in fact; and he then goes on to allege new facts by which he hopes to destroy the effect of the allegations admitted.
- (iii.) He may take a point of law, and say, "Assuming every word contained in this statement to be true, still I say that it is bad in law; it discloses no cause of action" (or "no defence to my action," or "no

answer to my plea," as the case may be) This was formerly called *demurring* (from the Latin *demorari*, or French *demorrer*, to "wait" or "stay"); because the party who demurred would not proceed with his pleading, but awaited the judgment of the Court whether any case was made out for him to answer What was formerly a *demurrer* is now called "*an objection in point of law*," which is a short definition rather than a name However, it exactly expresses what a demurrer was."*

Every objection in point of law asserts or implies that the pleading objected to is insufficient on the face of it; hence it admits for the moment that the allegations contained in it are true Thus, it may be said that a traverse denies, and an objection admits. But they are alike in this, that neither of them introduces any fresh matter, whereas a plea in confession and avoidance neither simply admits nor merely denies; it admits the facts alleged in the opponent's pleading, subject however to the new facts by which it seeks to destroy their legal effect.

Formerly, the party pleading had to elect which of these three courses he would adopt, he could not both demur and plead, nor could he traverse any allegation to which he also pleaded by way of confession and avoidance Now, however, he may adopt either or any of these methods, the same allegation may be traversed in point of fact, objected to as

* There is, however, this difference between the former demurrer and the present system. Formerly a party who had demurred could always without leave set the demurrer down for argument before the Court *in banc*, and thus frequently delay the trial of the action. Now the point of law raised by an objection is to be disposed of by the judge who tries the cause at or after the trial, unless a Master orders, or the parties consent, that the point of law be argued before the trial.

bad in law, and at the same time collateral matter may be pleaded to destroy its effect. Remember, however, that it is foolish to multiply the issues needlessly, as your client may be ordered to pay the costs of those which he fails to prove, even though he succeeds on the main issue.

This may be best explained by one or two instances —

Statement of Claim.

Writ issued November 18th, 1909.

1. On August 18th, 1909, the defendant promised to pay the plaintiff the sum of 300*l.* on November 18th, 1909.

2. The defendant did not pay the plaintiff the said sum of 300*l.*, or any part thereof, on November 18th, 1909, or at all.

And the plaintiff claims the said sum of 300*l.* with interest thereon at the rate of 5 per cent. per annum, from November 18th, 1909, till payment or judgment.

To this badly-drafted claim the defendant may, if he likes, take three objections in point of law. he is not bound to state them in his pleading unless he likes. He will probably also traverse the alleged agreement.

Defence.

1. The defendant never promised as alleged. (*Traverse.*)

2. The defendant will object that no consideration is shown for his alleged promise.

3. The defendant will object that no facts are disclosed which render any interest payable on the said sum of 300*l.*

4. The defendant will object that the writ was issued one day too soon.

But this is a technical kind of defence. Paragraph 1 is probably untrue; and there was probably also some consideration for the promise, if indeed it was not under seal, so that the plaintiff could amend his Statement of Claim and proceed. Paragraph 4 raises a more serious objection, but this can be got over by the plaintiff's discontinuing this action, paying the costs, and issuing a second writ. In the second action the defendant would probably be driven to confess and avoid.

Defence in Second Action.

1. The defendant admits that he promised to pay the plaintiff the said sum of 300*l.* on November 18th, 1909, but he promised to do so on one

condition only, viz :—that the plaintiff had by that day built a stable for the defendant in accordance with a specification dated May 3rd, 1909.

2. The plaintiff did not by November 18th, 1909, or any other day build a stable for the defendant in accordance with the said specification.

We thus learn at last what is the real bone of contention between the parties.

Take another instance —

Statement of Claim

(Indorsed on writ.)

1. On April 13th, 1901, the defendant agreed that if the plaintiff would supply goods to C D. he would see the plaintiff paid therefor.

2. On the faith of this guarantee, the plaintiff supplied C. D with the following goods, the price of which is 213*l.* 8*s.* 11*d.*

(Particulars of the goods supplied, with dates.)

3. Neither C. D. nor the defendant has paid the plaintiff the said price or any part thereof.

And the plaintiff claims 213*l.* 8*s.* 11*d.*

Defence

1. The defendant never agreed as alleged.

2. There is no memorandum in writing of the alleged agreement sufficient to satisfy the Statute of Frauds.

3. The plaintiff discharged the defendant from all liability by giving time to the principal debtor, the said C D

4. By a deed dated January 18th, 1903, made between the plaintiff and the defendant, the plaintiff released the cause of action on which he now sues.

5. Such cause of action, if any, did not accrue within six years, and the defendant will rely on the Statute of Limitations (21 Jac. I. c. 16).

(*N.B.*—Here the first paragraph traverses; the other four confess and avoid.)

Reply.

1. The plaintiff joins issue with the defendant upon paragraphs 1, 2, and 3 of the Defence.

[*This is a compendious form of traverse which is permitted in a Reply or any subsequent pleading.*]

2. The plaintiff was induced to execute the said release by the fraud of the defendant. Particulars of such fraud are as follows :—(*State them.*)

3. On May 15th, 1904, the defendant wrote and signed an acknowledgment that the debt now sued for remained unpaid and due to the plaintiff
[Paragraphs 2 and 3 respectively confess and avoid paragraphs and 5 of the Defence. A special Reply is necessary in this case.

Besides pleas by way of traverse and pleas by way of confession and avoidance, there were formerly also certain pleas which were called *dilatory pleas*, because they offered a merely formal objection to the proceedings, without presenting any substantial answer to the merits of the action. Such were—

- (a) A plea to the jurisdiction, by which the defendant took exception to the jurisdiction of the Court to entertain the action. Such an objection is, of course, still possible. It is, however, very seldom met with in practice, owing to the stringent provisions of Order XI, and to the power given to a defendant to move under Order XII r 30 to set aside the service of the writ.
- (b) A plea in suspension of the action, a plea which showed some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas was always small, and none of them were of ordinary occurrence in practice. Their place is now taken by a summons to stay proceedings, on the hearing of which the point is summarily decided.
- (c) A plea in abatement, a plea which showed some good reason for abating or quashing the Statement of Claim on the ground that it was improperly framed, without at the same time, tending to deny the right of action itself. *e.g.*, the misnomer of a defendant, or the non-joinder of a necessary party. But now "no plea or defence shall be pleaded in abatement" (Order XXI r 20). The defendant must himself correct the misnomer, and he may, if he thinks fit, take out a summons to have the missing plaintiff or defendant made a party. (See *post*, p. 192.)

In contradistinction to these dilatory pleas, traverses and pleas in confession and avoidance were called *peremptory* pleas or *plea in bar*, because they barred or impugned the right of action altogether.

These three things—traverse, confession and avoidance, and objection in point of law—must be kept clear and distinct. The pleader may adopt any one or two or all three of these methods of pleading, so long as he makes it quite clear which he is adopting. The object of a traverse is merely to compel the opposite party to prove his allegations true in fact, it does not dispute their sufficiency in point of law. If either party desires to object to his opponent's pleading in point of law, he must do so clearly and distinctly by way of objection. A plea, which may be either a traverse or an objection, is embarrassing and will be struck out. (*Stokes v. Grant*, 4 C. P. D. 25.)

Moreover, an objection in point of law can only be raised where the fault of which you desire to take advantage is apparent on the face of the pleading to which you object. You cannot state new facts in your own pleading or on affidavit, and then contend that the result of the combination is to show that your opponent is wrong in his law. It is the province of a plea in confession and avoidance to state new facts which put your opponent out of court.

Illustrations.

If in a Statement of Claim facts be alleged "by reason whereof the plaintiff became seised, &c.," or "the defendant became liable, &c.," the defendant must not traverse, denying that "by reason thereof, &c." For if he intend to question the facts from which the seisin or liability is deduced, he should traverse these facts and them only, if he disputes the legal inference drawn from the facts, then the proper course is for him to object, or he may do both, if he keeps the two defences clear and distinct.

Priddle and Napper's Case, 11 Rep 8, 10

In an action of covenant, the plaintiff set out a deed which contained a recital that the plaintiff was the inventor of certain looms, and had given the defendants permission to use them, in consideration of their paying him certain moneys. The defendants pleaded that the plaintiff was not the true inventor. To this plea the plaintiff should have replied specially, setting up the recital by way of estoppel, as the defendants

were estopped from denying the statement made in the deed which they had executed. Instead of doing this he took issue in fact on the plea. It was held, that in that state of the record the defendants were not estopped by the recital of the deed from proving that the plaintiff was not the true inventor. The plaintiff had in fact waived the estoppel by his bad pleading

Bowman v Rostron, 2 A. & E 295, n.

So, too, a traverse cannot be made to do the work of a plea in confession and avoidance. Its office is to contradict, not to excuse. Matter justifying an act must not be insinuated into a plea which denies the act. "All matters in confession and avoidance shall be pleaded specially" (Pleading Rules of Hilary Term, 1853, rr 12, 17.)

As a general rule* the burden will lie on your opponent to prove at the trial the facts which you have traversed; but the burden will lie on you to prove the facts which you have alleged by way of confession and avoidance. And you will not be allowed to shift the *onus* of proof by traversing when you should confess and avoid, even where your opponent has given you the opportunity by introducing an unnecessary averment into the preceding pleading.

Illustrations.

A Statement of Claim in libel or slander always alleges that "the defendant falsely and maliciously wrote [or 'spoke'] and published the words." Yet the defendant may not plead "the defendant never wrote [or 'spoke'] or published the said words falsely or maliciously or at all." For this, while apparently merely a denial of the fact of publication, is also an insinuation that the words are true, and that the occasion of publication is privileged. It is in fact a traverse and two pleas in confession and avoidance all rolled into one. It is for the plaintiff to prove the publication, for the defendant to prove truth or privilege.

Belt v. Lawes, 51 L. J. Q. B. 359.

So in an action against a master for the dismissal of his servant, the Statement of Claim will certainly allege that the defendant *wrongfully*

* But see *post*, p 294.

dismissed the plaintiff from his employ. But the defendant ought not to traverse this allegation in its entirety. To plead "The defendant never wrongfully dismissed the plaintiff," would be bad pleading, for it is ambiguous. Does it mean "The defendant never in fact dismissed the plaintiff," or "The defendant had a right to dismiss the plaintiff and therefore did so"? The defendant may plead both defences or either, so long as he makes his meaning clear. He may traverse the fact of dismissal, if he wishes. He may go on to justify the dismissal by showing that the plaintiff was guilty of misconduct which entitled the defendant to dismiss him. This would be a plea in confession and avoidance, and it should state the particular acts of misconduct on which the defendant relies as justifying the dismissal (*ante*, pp. 137, 138). It is for the plaintiff to prove the dismissal, and for the defendant to show that it was justified.

Lush v. Russell, 5 Ex. 203, 19 L. J. Ex. 214.

Horton v. McMurtry, 5 H. & N. 667, 29 L. J. Ex. 260, 8 W. R. 285.

TRAVERSES.

A traverse is the express contradiction of an allegation of fact in an opponent's pleading, it is generally a contradiction in terms. It is, as a rule, framed in the negative; because the fact which it denies is, as a rule, alleged in the affirmative.

As to traverses, there are three fundamental rules, the object of which is to compel each party in his turn to admit frankly, or deny fully, each allegation of fact in the pleading of his opponent —

I. EVERY ALLEGATION OF FACT IN ANY PLEADING, IF NOT DENIED SPECIFICALLY, OR BY NECESSARY IMPLICATION, OR STATED TO BE NOT ADMITTED IN THE PLEADING OF THE OPPOSITE PARTY, SHALL BE TAKEN TO BE ADMITTED, EXCEPT AS AGAINST AN INFANT, LUNATIC, OR PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION. (Order XIX r 13)

II. EACH PARTY MUST DEAL SPECIFICALLY WITH EACH ALLEGATION OF FACT OF WHICH HE DOES NOT ADMIT THE TRUTH, EXCEPT DAMAGES * (Order XIX r 17.)

III. WHEN A PARTY IN ANY PLEADING DENIES AN ALLEGATION OF FACT IN THE PREVIOUS PLEADING OF THE OPPOSITE PARTY, HE MUST NOT DO SO EVASIVELY, BUT ANSWER THE POINT OF SUBSTANCE. (Order XIX. r 19.)

Due observance of these rules will speedily bring the parties to a definite issue.

Note, first, that only allegations of fact should be denied.

* No denial or defence is "necessary as to damages claimed, or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted" (Order XXI. r 4) And see *post*, p. 218.

If your opponent pleads matter of law, you should not traverse it.

Illustrations

In an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing; and the plaintiff, in his replication, denied that in the said arm of the sea every subject of the realm had the liberty and privilege of free fishing. This was held to be a traverse of a mere inference of law, and therefore bad.

Richardson v. Mayor of Orford, 2 H. Bl. 182.

So where, in an action for improperly removing a wall, the plaintiff alleged that it was the defendant's duty to have taken proper precautions in pulling it down so as not to injure an adjoining vault of the plaintiff's, and the defendant pleaded by way of traverse that it was not his duty to have taken any precautions, this was held a bad plea

Trower v. Chadwick, 3 Bing. N. C. 334; 3 Scott, 699

Matters of law, or any other matters which are not fit subjects of traverse, are not taken to be admitted by the defendant's "pleading over" (*i.e.*, by his omitting all reference to them in his pleading).

See *The King v. The Bishop of Chester*, 2 Salk. at p. 561

Bennion v. Davison, 3 M. & W. 179.

Gale v. Lewis, 9 Q. B. 730, 16 L. J. Q. B. 119

King v. Norman, 4 C. B. 884, 17 L. J. C. P. 23

Neither party should traverse matter not alleged, he should be content to answer the case that is actually laid against him, not that which he thinks his opponent meant or ought to have raised. Neither should he plead to his opponent's particulars, or to any matter in his pleading introduced by a *videlicet*, nor to the prayer or claim for relief at the end of his pleading

Illustrations.

Action against an administratrix founded on a promise made by the intestate. Defence "The defendant (*i.e.*, the administratrix, not the intestate) never promised as alleged." This was held to be obviously immaterial and bad.

Anon., 2 Vent. 196.

Rassam v. Budge, (1893) 1 Q. B. 571, 62 L. J. Q. B. 312, 41

W. R. 377, 68 L. T. 717.

It is quite unnecessary to plead "The particulars delivered by the

plaintiff in pursuance of the order of Master ———, dated July 2nd, 1909, are insufficient to enable the defendant to check the prices of the items charged for” Plead boldly “The defendant never agreed to pay the plaintiff the prices he has charged for the said work, labour, and materials. Such prices are unreasonable and exorbitant”

In an action of debt on a bond conditioned for the payment of 1,550*l*, the defendant pleaded, that “part of the sum mentioned in the condition, to wit, 1,500*l*, was won by gaming, contrary to the statute in such case made and provided;” and that the bond was consequently void. The plaintiff, in his replication, denied that 1,500*l*. was won by gaming as alleged. The Court was of opinion that the material part of the plea was, that part of the money for which the bond was given was won by gaming, that the words “to wit 1,500*l*,” were only form, of which the replication ought not to have taken notice, and that the replication was ill, because it put the precise sum in issue, and tended to oblige the defendant to prove that the whole 1,500*l* was won by gaming, whereas the statute avoids the bond if any part of the consideration be on that account. The proper replication would have been “No part of the sum mentioned in the condition was won by gaming.”

Colborne v Stockdale, 1 Stra. 493.

I *Every allegation of Fact not denied is admitted.*

The pleader must either admit or deny every material fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, the rule provides that every allegation of fact which the pleader desires not to admit must either be denied specifically or by necessary implication, or be stated in his pleading to be not admitted. As a rule, he should deny, when the facts are necessarily within his client's own knowledge other facts which happen *inter alios*, &c, he may refuse to admit. But he must be just as specific in not admitting as in denying (*per* Jessel, M. R., in *Thorp v. Holdsworth*, 3 Ch. D. at p. 640), in either case he must leave no uncertainty as to how much or how little he intends to admit.

What is meant by “necessary implication”? Where traversing one allegation necessarily and unmistakably traverses another as well, the latter allegation is denied by necessary

implication But if there can possibly be any misconception about the matter, it is safer to deny both expressly

It is in the power of the party either to admit or to deny each allegation in his opponent's plea, as he thinks fit If he decides to deny it, he must do so clearly and explicitly Any equivocal or ambiguous phrase will be construed into an admission of it. There is no third or intermediary stage If the judge does not find in the pleading a specific denial or a definite refusal to admit, there is an end of the matter, the fact stands admitted.

Illustrations

Claim for specific performance of a contract Defence "The defendant puts the plaintiffs to proof of the several allegations in their Statement of Claim." Held, that all the plaintiffs' allegations were admitted.

Harris v. Gamble, 7 Ch. D. 877, 47 L J Ch. 344, 38 L T. 253.

Defence "The defendants do not admit the correctness of" certain allegations in the Statement of Claim, "and require proof thereof." Held, an insufficient denial. The defendants were ordered to state in what respects they disputed these allegations

Rutler v Tregent, 12 Ch D. 758, 48 L J Ch. 791, 27 W R. 902, 41 L T 16.

Defence "The terms of the arrangement were never definitely agreed upon as alleged" Held, that such a traverse was an evasive denial within the rules of Order XIX, and that it admitted that an agreement was in fact made as alleged Jessel, M R "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of this Order is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be discussed and decided was . The defendant is bound to deny that any agreement or any terms of arrangement were ever come to, if that is what he means, if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and then state what those terms were "

Thorp v Holdsworth, 3 Ch. D. 637, 45 L J. Ch 406

If I deny that the defendant was ever tenant to the plaintiff of certain premises, I deny by necessary implication that the plaintiff ever demised those premises to the defendant. But the converse does not hold. The defendant may now be tenant to the plaintiff, although the plaintiff never demised the premises to him. *E.g*, the plaintiff's ancestor may have

4 J S died on August 8th, 1911 By his last will he appointed his widow, the plaintiff, his executrix

5 Since the death of J S the plaintiff, in ignorance of the facts alleged in paragraphs 3 and 6, has paid the defendants various sums, amounting in all to 812*l*

6 The defendants have received from the estate of Charles S dividends on 1,081*l* 16*s*, amounting in all to 326*l* 16*s* But they have not paid the same over to the plaintiff or given her credit therefor

7 The plaintiff has thus overpaid the defendants the amount of 382*l*, which, as executrix of J S, she claims from the defendants as money received by them to her use

No 56

MONEY PAID

1 By an indenture of lease, dated April 24th, 1894, the plaintiff demised to the defendant a house, No 3, Albion Terrace, Hackney, at the yearly rent of ———*l*, payable quarterly, and the defendant covenanted with the plaintiff that he would at all times during the term "pay the land-tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during the demise be assessed or imposed on or in respect of the said demised premises or of the rent hereby reserved (landlord's property tax only excepted)"

2 In the month of March, 1896, the drains of the said house were defective and injurious to the health of the neighbourhood

3 Thereupon the Hackney Vestry, on March 3rd, 1896, served a notice upon the plaintiff under the Public Health (London) Act, 1891, ordering and requiring him to abate the nuisance arising from the state of the drains of the said house, and for that purpose to take up the existing drains and lay down new and proper drains throughout the premises

4 The plaintiff did the work required by the said vestry, and thereby incurred an expense of 148*l* He has demanded payment of this sum from the defendant, who refuses to pay the same

And the plaintiff claims 148*l*

[See *Brett v Rogers*, (1897) 1 Q B 525, 66 L J Q B 287]

No 57

✓ TENANT *v* LANDLORD

1. On January 25th, 1911, the defendant, in consideration of the plaintiff's agreeing to become tenant of a house of the defendant's, known as No 7, ——— Street, N W , at the rent of 170*l* a year, payable quarterly, agreed to repair the said house throughout to the taste and satisfaction of the plaintiff, and in particular to put an "Eagle" range in the kitchen, to properly fix a bath in the bath-room with hot and cold water laid on, and to put the drainage of the said house into a condition satisfactory to a surveyor to be named by the plaintiff.

2. The plaintiff, relying on the defendant's said agreement, became tenant to the defendant of the said house, and has agreed and made himself liable to pay to the defendant the said rent

3 Yet the defendant has not executed or completed the said repairs to the taste and satisfaction of the plaintiff, or at all, he has not put an "Eagle" range in the kitchen, he has not properly or at all fixed a bath in the bath-room with hot and cold water laid on, he has not put the drainage of the said house into a condition satisfactory to any surveyor

4 The plaintiff has thereby been put to serious inconvenience and discomfort, and has suffered damage, and in particular has been unable to live in the said house for a period of seven weeks, and has been unable to carry on his profession as a solicitor, and has been compelled to incur expense in taking furnished apartments elsewhere, and in removing thither

And the plaintiff claims ———*l* damages.

No 58.

WARRANTY ON THE SALE OF A MARE.*

1 The plaintiff is an infant who sues by his brother, C. D , as his next friend The defendant is a horse dealer carrying on business at Reading, in the county of Berks

* Contrast this claim in contract with claims in tort for fraudulent misrepresentation, such as Precedents Nos 61 and 62. In the above case a claim for fraud might well have been added, as the defendant must have known that this was the mare which Mr Thornton had returned on his hands.

demised the premises to the defendant for a long term which is still unexpired

The party pleading is entitled either to admit or deny, as he thinks fit. Hence there is no need for him to apologize for his denial, or to explain why he does not admit the allegation. For instance, it is quite unnecessary for him to plead: "The defendants do not know when the plaintiffs first published the photographs referred to in the second paragraph of the Statement of Claim, and therein alleged to be photographs representing, &c , and therefore they do not admit that such photographs were first published and circulated by the plaintiffs in or about the month of October, 1889, as in the said paragraph alleged "

How much ought the party pleading to admit, and how much to deny? Clearly it is wrong to deny plain and acknowledged facts, or any fact which it is not to your client's interest to deny. It was intended by the framers of the Judicature Act that each party in his pleading should frankly admit every statement of fact which he does not intend seriously to dispute at the trial. But this intention has not been carried out. Counsel hesitate to make admissions, unless they are expressly instructed to do so, which they very seldom are. Solicitors hesitate to instruct counsel to make admissions, because the facts have not yet been thoroughly sifted; they do not feel sure that they have got to the bottom of the case; and they fear something may turn up hereafter which may make them wish to recall the admission.* Either party may at any stage of the case move for judgment on the admissions which have been made by the other side (Order XXXII. r. 6.) You must be careful, therefore, how you admit even introductory paragraphs, which may appear immaterial, they were not inserted without some purpose. Besides, it is sometimes desirable to deny a particular fact so as to compel your opponent to call as his witness a person whom you wish to cross-examine, or by whose evidence

* This, in a proper case, can be done (*Hollis v. Burton*, (1892) 3 Ch. 226, 40 W. R. 610, 67 L. T. 146).

you hope to prove a particular fact essential to your case, and thus, perhaps, to be enabled to dispense with calling any witnesses, and so gain the right to the last word.

On the other hand, in actions for debts or liquidated damages, the defendant, by omitting to plead any denial or refusal to admit, and pleading affirmatively only, may gain the right to begin. Where, however, the action is brought for unliquidated damages, this consideration does not apply, for in that case the plaintiff is always entitled to begin, even though the burden of proof lies on the defendant (See *post*, p. 307.)

But as a rule each party should admit whatever facts can be proved against him without trouble. Moreover, it looks weak to deny everything in your opponent's pleading. It suggests that you have no substantial defence to it. "By rashly traversing statements which are obviously true, much unnecessary expense may be caused." (*Per* Fletcher Moulton, L. J., in *Lever Brothers v. Associated Newspapers*, (1907) 2 K. B. at p. 628.) Hence, it has been wisely provided by Order XXI. r. 9, that "where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the Defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted." It is a pity that our judges make little or no use of this power.

There is one case in which it is shameful not to make a proper admission. If your opponent relies on a written document, he will either set out the words of the document in his pleading, or he will state shortly its effect. In the latter case, as your construction of the document will probably differ from his, it is quite legitimate to traverse his version of its effect. But if he sets out the actual words correctly, it is to my mind slovenly work to plead, as is sometimes done, "The defendant does not admit that the terms of the said indenture are sufficiently or correctly set forth in paragraph 4 of the Statement of Claim, and craves leave to refer

to the original thereof at the trial for greater certainty as to its terms and effect " Why "crave leave" to do hereafter that which you have now an absolute right to do? "Every party to a cause shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof " (Order XXXI r 15) Obtain a copy of the document under this rule, if you have not one already, and see if its terms are or are not correctly stated by your opponent. If they are, admit that they are, adding such other portions as you yourself rely on If they are not, then set them out correctly yourself, if you deem them material I always suspect that the man who "craves leave" is perfectly familiar with the contents of the document all the time

II. *Denials must be Specific.*

"It shall not be sufficient for a defendant in his Defence to deny generally the grounds alleged by the Statement of Claim, or for a plaintiff in his Reply to deny generally the grounds alleged in a Defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages " (Order XIX. r. 17) The party pleading must make it quite clear how much of his opponent's case he disputes Sometimes, in order to obey the rule and to deal specifically with every allegation of fact of which he does not admit the truth, it is unnecessary for him to place on the record two or more distinct traverses to one and the same allegation Merely to deny the allegation in terms will often be ambiguous

Illustrations.

Claim "The defendant broke and entered the close of the plaintiff" [*specifying it*]. If the defendant pleads "The defendant never broke or entered the close of the plaintiff," the more obvious meaning of this allegation is that he never broke or entered the close which the plaintiff claims as his, but it may be that his case is that the close specified does

not belong to the plaintiff. The words are capable of that meaning, and if such ambiguity were permitted, pleadings would lose their utility. If the defendant intends at the trial to deny the plaintiff's possession or right to possession of the close in question, he must say so distinctly. A literal traverse of the words of the claim will be taken to deny merely that the defendant, in fact, broke and entered that close. If, then, the defendant desires to raise both defences—to deny both the act complained of and the plaintiff's title to the land—he must put on the record two separate paragraphs, *e g* —1. "The defendant never broke or entered the said close. 2 The said close is not the plaintiff's close."

Pleading Rules of Hilary Term, 1853, r 19.

In an action of trover, detinue, or trespass to goods, the defendant is similarly required to deny specially that the goods were the property of the plaintiff. A mere traverse of the conversion, detention, or trespass will be taken as denying merely the acts complained of.

Pleading Rules of Hilary Term, 1853, rr 15, 20.

Again, if the plaintiff alleges that "the said A. B. executed the said deed on behalf of the defendant, as his agent, acting under a power of attorney duly signed by the defendant," the defendant must not plead, "The defendant denies that the said A. B. executed the said deed on behalf of the defendant, as his agent, under a power of attorney duly signed by the defendant." If he wishes to traverse the whole allegation he must plead

"1. The said A. B. never executed the said deed.

"2 The said A. B. never executed the said deed on behalf of the defendant, or as his agent.

"3 The defendant never signed any such power of attorney as alleged, nor did A. B. ever act thereunder."

Otherwise it would not be clear how much of the plaintiff's allegation the defendant really denies.

So, if the defendant says that he never seduced the plaintiff's servant, this will be taken as a denial of the act of seduction. The defence that the girl seduced was not the plaintiff's servant must be specially pleaded.

Torrence v Gibbins, 5 Q. B. 297, 13 L. J. Q. B. 36.

If the respondent in a suit for dissolution of marriage wishes to raise at the hearing any question as to the paternity of any child the custody of which is claimed by the petitioner, she must file an answer in the suit specifically raising the question.

Gordon v. Gordon, (1903) P. 92, 72 L. J. P. 34, 88 L. T. 573.

Whenever the cause of action depends on the plaintiff's holding a certain office, or carrying on a profession or trade, the defendant must

always specially deny that the plaintiff held that office, or carried on that profession or trade, at date of writ, if such be the fact

Gallwey v Marshall, 9 Ex 300, 23 L. J. Ex 78

If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically

Order XXI 1 5

III *Denials must not be Evasive*

“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance”

Or using the old phraseology, A TRAVERSE MUST BE NEITHER TOO LARGE NOR TOO NARROW He must deny enough and not too much.

Illustrations.

If it be alleged that the defendant received a certain sum of money, it will not be sufficient for him to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received

Order XIX. r. 19.

The plaintiff alleged that his agent, the defendant, had not handed over to him certain rents which he had received from the plaintiff's tenants. Defence “The defendant has handed over to the plaintiff all the rent which he has received from the plaintiff's tenants.” This is a bad traverse, though it is in the very words of the claim. It is not clear whether the defendant has received all the rent due or part or none of it. He must state whether he has received any, and, if any, how much rent, and what amount he handed over to the plaintiff, and when.

Kennett v. Mundy, Judge at Chambers (not reported).

How should a defendant traverse this statement. “The premises were handed over in an unfinished condition” ? If he says, “The defendant denies that the premises were handed over in an unfinished condition,” this may mean that the premises have never yet been handed over at all. A similar objection will apply if he pleads “The premises were not handed over in an unfinished condition.” The right traverse is: “The premises were finished when handed over.”

Action against a sheriff for an escape Defence that, if any such

escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c The Court refused to allow the plea to be so framed, for "he cannot plead hypothetically, that if there has been an escape, there has also been a return He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes, after which the prisoner returned" It was an evasive denial which was half an admission.

Griffiths v Eyles, 1 Bos. & Pul 413.

The condition of a bond obliged the defendants to see that L., a collector of property tax, duly performed certain duties of his office specified therein The defendants pleaded that they had performed all things on their part to be performed. Such plea was held to be bad in substance, because (amongst other reasons) it averred general performance by the defendants, instead of showing how they had performed the condition; and also for not showing that L. had performed his duties. "It is left altogether uncertain what the acts are that the defendants rely on as amounting to performance."

Kepp v. Wiggett, 6 C. B 280, 290; 17 L. J. C. P 295

So in an action of debt on a bond conditioned for the payment of a sum of money, and for the performance of covenants in an indenture, a plea of general performance was held ill, for the condition being to do several things, the defendant was bound to plead to each particularly by itself

Roakes v Manser, 1 C. B. 531; 14 L. J. C. P. 199.

The defendant bound himself by a bond to perform all the covenants and other matters contained in a certain indenture some of which were in a disjunctive or alternative form, so that the defendant engaged to do either one thing or another Here also an allegation of general performance would be improper, and indeed altogether equivocal, the defendant must show which of the alternative acts he performed.

Oglethorp v. Hyde, Cro Eliz 233

Dangers of a literal Traverse

Do not traverse too literally. It is sufficient to answer the point of substance. A traverse may become evasive, if it follows too closely the precise language of the allegations traversed.

(i.) By traversing too literally you may fall into the vice of pleading "a negative pregnant." A negative pregnant is such a form of negative expression as may imply or carry

within it an affirmative proposition It is therefore evasive and ambiguous, and must not be used

Illustrations

A Statement of Claim alleged that the defendant offered the plaintiff a bribe of 500*l*. The defendant pleaded "that he had never offered the plaintiff a bribe of 500*l* ", which would have been true if he had offered 400*l* or any other sum instead of 500*l*. Such a denial half admits the main allegation that a bribe of some kind had been offered. It is therefore an unfair and evasive denial. The defendant should have pleaded that he never offered a bribe of 500*l*. or any other sum.

Tildesley v. Harper, 7 Ch. D. 403; 47 L. J. Ch. 263, (C. A.)
10 Ch. D. 393; 48 L. J. Ch. 495; 27 W. R. 249; 39 L. T.
552.

Colborne v Stockdale, 1 Stra. 493, *ante*, p. 151.

In an action of trespass the plaintiff claimed damages for the defendant's entering his house. The defendant pleaded that the plaintiff's daughter gave him licence to do so, and that he entered by that licence. The plaintiff replied that the defendant *did not enter by her licence*. This was considered as a *negative pregnant*, for the pleading left it in doubt whether the plaintiff meant that there never was a licence, or that the defendant did not enter by virtue of it. And it was held that the plaintiff should have traversed the entry by itself, or the licence by itself, and not both together.

Myn v. Cole, Cro. Jac. 87.

Action for assault and battery by a sailor against the master of his ship. The defendant justified, saying that he bade the plaintiff do some service in the ship, but the plaintiff refused wherefore the defendant moderately chastised him. The plaintiff replied that the defendant did not moderately chastise him. And this traverse was held to be a *negative pregnant*, for it might mean either that the defendant did not chastise the plaintiff at all, or that he chastised him immoderately; and is therefore ambiguous.

Auberie v. James, Vent. 70; 1 Sid. 444, 2 Keb. 623.

(11.) Again, there may be many details which were properly introduced into your opponent's pleading, but which it is unnecessary for you to traverse expressly. By so doing you may raise false issues, and so evade "the point of substance" "If an allegation is made with divers circumstances, it shall

not be sufficient to deny it along with those circumstances " (Order XIX. r. 19) [The addition of the words "or at all" will often cure this defect.]

Illustrations

The plaintiff pleaded that the Queen, at a manor court held on such a day, by J. S., her steward, and by copy of court roll, &c., granted certain land to A. The defendant traversed this allegation *totidem verbis*, he pleaded "that the Queen had not, at a manor court held on such a day, by J. S., her steward, and by copy of court roll, granted the said lands to A." The Court held that this was a bad traverse. "The Queen never granted the said lands to A." would have been sufficient, for the plaintiff was not bound to prove a grant on any particular day, or by any particular steward.

Lane v. Alexander, Yelv. 122.

If the plaintiff, in an action for wages, alleges that he has served the defendant as a hired servant from March 25th, 1908, to June 24th, 1909, at Epsom, in the county of Surrey, it would be a bad traverse for the defendant to plead "The plaintiff did not serve the defendant as a hired servant from March 25th, 1908, to June 24th, 1909, at Epsom, in the county of Surrey." The defendant must either deny that the plaintiff ever served him at all, or else state for how long he admits the plaintiff did serve him. And he must not traverse the place, which is immaterial, or if he does he must add the words, that the plaintiff did not serve him at Epsom "or in any other place."

Doctrina Placitandi, 360.

Osborne v. Rogers, 1 Wms. Saund. 267.

Alsager v. Currie, 11 M. & W. 14.

To a Statement of Claim alleging that "the defendant in or about Michaelmas, 1907, called upon several of the plaintiff's tenants at the premises, Nos. 43, 45, & 47, Bayham Street, Camden Town, and spoke and published to them" a slander on the plaintiff's title, it is sufficient to plead, "The defendant never spoke or published the said words." For that answers the point of substance, and the rest is denied by necessary implication. To plead that the defendant did not call on several of the plaintiff's tenants, &c., would seem to admit that he called on one or two of them; and to deny that he spoke the words to any of the plaintiff's tenants would be consistent with having spoken them to someone not a tenant of the plaintiff's, which might be equally actionable.

(iii.) If your opponent's allegation be in the *conjunctive*,

you must plead to it in the *disjunctive*; otherwise your traverse may be too large, for it is seldom, if ever, necessary for your opponent to prove at the trial the whole of his allegation precisely as he has pleaded it. In other words, when traversing, remember always to turn "and" into "or," and "all" into "any."

Illustrations

Claim "The defendants broke and entered the plaintiff's close and depastured the same with sheep and cattle" The proper traverse is "Neither defendant broke or entered the plaintiff's close or depastured the same with any sheep or cattle."

In an action on a policy of insurance, the plaintiff averred "that the ship insured did not arrive in safety, but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage." The defendant pleaded, denying "that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the voyage, in manner and form as alleged." This was held a bad traverse, the defendant ought to have pleaded disjunctively, denying that the ship, or tackle, or apparel, &c, was sunk or destroyed, because the plaintiff was entitled to recover compensation for anything that was insured and had been lost, whereas (it was said), if issue had been taken on the plea as pleaded in the conjunctive form, "and the defendant should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole."

Goram v. Sweeting, 2 Wms. Saund. 205.

Moore v. Boulcott, 1 Bing N. C. 323.

Stubbs v. Lamson, 1 M. & W. 728, 5 Dowl. 162.

See other instances of a traverse being too large—

Basan v. Arnold, 6 M. & W. 559

De Medina v. Norman, 9 M. & W. 820, 2 Dowl. N. S. 239.

Aldis v. Mason, 11 C. B. 132, 20 L. J. C. P. 193.

Dawson v. Wrench, 3 Ex. 359, 18 L. J. Ex. 229.

As to traverses which have been held not too large, see—

Palmer v. Gooden, 8 M. & W. 890; 1 Dowl. N. S. 673

Eden v. Turtle, 10 M. & W. 635

How far should the pleader confine himself to merely traversing? Should he not, after denying his opponent's story, go on to add his own version of the matter?

This is sometimes a difficult question. The pleader must use his own discretion. It is sometimes most desirable to do so, in order to show clearly what is the real point in dispute * If, for instance, a plaintiff in his Statement of Claim sets out or refers to certain clauses of a written contract on which he relies, the defendant should certainly set out or refer to other clauses, if any, which tell in his favour. Again, if the plaintiff gives his version of the effect of a written document, it will certainly tend to clear the matter up if the defendant, instead of merely denying the plaintiff's version, states also his own construction of the document. And in many cases it may be desirable for a defendant thus to state definitely what his exact contention is. But by so doing he necessarily somewhat limits his case at the trial. He has no longer the same free hand. And there is this further danger, that if the defendant, instead of merely denying, sets up an affirmative case as well, both judge and jury will expect him to prove his affirmative case, and are apt to find against him if he does not. The *onus* of proof is not really shifted by such a method of pleading (*Kilgour v Alexander*, 14 Moore, 177). But if, when accused of a tort, the defendant pleads, "It was A who did it, not I," the jury will be inclined to treat this as an admission that either A or the defendant did it, and to conclude that if the defendant cannot prove his assertion that A did it, he must have done it himself.

Illustrations

A purchaser sued his vendor for not delivering a proper abstract of title, and alleged that the sale was subject to a condition that the vendor should deliver an abstract showing a good title, and that no such abstract had been delivered. The defendant would now be permitted to plead that the contract between himself and the plaintiff really was that the defendant should deliver an abstract commencing with *a particular deed only*, and that he had done this; though in 1847 such a plea was held bad on special demurrer as an argumentative traverse of the contract declared on.

Sharland v. Leifchild, 4 C. B. 529, 16 L. J. C. P. 217

If the defendant's real case is that he was not guilty of any negligence himself, it is often unwise for him to plead that there was contributory negligence on the part of the plaintiff.

* See the judgment of Jessel, M. R., in *Thorp v Houldsworth*, part of which is quoted *ante*, p. 152.

If the defendant's case is that the plaintiff is not seised in fee, he need not state who *is* seised in fee, of the land.

Robert Bradshaw's Case, 9 Rep. 60 b, *ante*, p. 108

Argent v Durant, 8 T. R. 403, *post*, p. 166.

Where the defendants were sued, as sheriffs of London, for allowing a debtor, Robinson, to escape, they pleaded that it was their predecessors in office who had allowed Robinson to escape. This was held a bad plea, because it neither traversed nor confessed the allegation that the defendants had allowed Robinson to escape. They should have merely denied the act attributed to themselves, and not have set up affirmatively that others were guilty of it.

Mynours v. Turke and Yorke, Sheriffs of London, 1 Dyer, 66 b

Action for breach of copyright The plaintiff alleged that his song had been duly registered according to the Copyright Act. The defendant pleaded, "The defendant denies that the said song has been duly registered, the date of the first publication thereof is not truly entered." Had he not added the latter clause he might have won the action, as it was, he failed. For it turned out at the trial that the date of publication was truly entered, but the name of the publisher was not. The Act required both to be truly stated, hence the song had not in fact been duly registered. But Fry, J., held that it was not open to the defendant to raise this point, the manner in which the defendant had pleaded was, in effect, "an admission that in every respect but that one which was mentioned the registration was duly effected." And he refused leave to amend.

Collette v Goode, 7 Ch. D. 842, 47 L. J. Ch. 370; 38 L. T. 504.

So where a plaintiff alleged that H. "agreed by writing under the hand of his agent thereunto lawfully authorized," the defendant pleaded that "H. never agreed by writing under the hand of any agent thereunto lawfully authorized," but added that "H. was of unsound mind, and therefore could not lawfully authorize any agent" It was held that this addition limited the preceding general words, so that H.'s unsoundness of mind was the only substantial issue raised, and that if H. was of sound mind, the defendant could not go into other matters to show that in fact H. never authorized anyone to sign this agreement; because "the denial, being justified by a fact specifically alleged and no other, must be taken to refer to that fact alone."

Byrd v. Nunn, 5 Ch. D. 781, 25 W. R. 749; 37 L. T. 90;
(C. A.) 7 Ch. D. 284, 47 L. J. Ch. 1, 26 W. R. 101; 37 L. T.
585.

Cf. *Harris v Mantle*, 3 T. R. 307, *post*, p. 200.

And *Angerstein v. Handson*, 1 Cr. M. & R. 789, *post*, p. 182

MATTERS IN CONFESSION AND AVOIDANCE.

The party pleading is often willing to admit that the facts alleged by his opponent are so far true, and that they make out a good *prima facie* case or defence. But he desires to destroy the effect of these allegations either by showing some justification or excuse of the matter charged against him, or some discharge or release from it. A defendant, for instance, may seek to show on the one hand that the plaintiff never had any right of action, because the act charged was under the circumstances justifiable; or, on the other, that, though the plaintiff had once a right of action, it has been discharged or released by some matter subsequent. In either case, he confesses the truth of the allegation which he proceeds to answer or avoid. Hence such defences are called *pleas in confession and avoidance*.

The effect of such admission, if it stand alone, is extremely strong, for it concludes the party making it, even though the jury should improperly go out of the issue, and find the contrary of what is thus confessed on the record. (*Hewitt v. Macquire*, 7 Ex 80.) At the same time, the confession operates only to prevent the fact from being brought into question in the same suit; it is not conclusive as to the truth of that fact in any subsequent action between the same parties. And it will have no such operation at all, even in the same suit, if the party pleading also traverses the facts confessed, as he may do now.

Illustrations.

Action of assault. Defence that the defendant did the acts complained of in necessary self-defence. This is a plea in confession and avoidance; for it admits the assault while it justifies it.

Similarly, in an action of libel, a plea that the words are true or that they were published on a privileged occasion admits that the defendant published the words of the plaintiff, but justifies or excuses the act. To plead that the defendant has a lien on certain goods admits that the goods are the plaintiff's, and that the defendant detains them from him. And generally in any action of tort if the defendant admits the act complained of, but desires to show that it was not wrongful or no breach of duty, he must plead such justification specially by way of confession and avoidance.

Frankum v Lord Falmouth, 2 A. & E. 452, 4 N. & M 330.

Lush v. Russell, 5 Ex. 203; 19 L. J. Ex 214.

On the other hand, pleas of tender, of payment or set-off, of waiver or accord and satisfaction, or laches or of the Statute of Limitations, admit that the plaintiff once had a cause of action, but assert that it is now lost, expended, or discharged.

All matter in confession and avoidance must be pleaded specially. The pleader must not attempt to insinuate it under an apparent traverse, he should state it clearly and distinctly, and in a separate paragraph. At the same time, he should not confess and avoid where a mere traverse is sufficient. For he will thus introduce collateral matter which his client may have to prove, instead of putting the plaintiff to proof of his allegations.

Illustrations

"The defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if it raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, or facts showing illegality either by statute or common law, or Statute of frauds."

Order XIX. r. 15.

If a defendant merely pleads that "he never agreed as alleged," he must not insist at the trial that though a contract was made as alleged it is invalid in point of law, for this must form the subject of a special

allegation, showing the circumstances out of which the supposed to arise.

Order XIX. r. 20.

And see *Belt v. Lawes*, 51 L. J. Q. B. 359, *ante*, p. 14

This applies not only to the case where the claim is for express promise of an illegal description, but also to cases where action is based on an implied promise, and the services or consideration upon which the implication is supposed to arise were tainted by illegality.

Potts v. Sparrow, 1 Bing. N. C. 594.

Contributory negligence must be specially pleaded.

See "*Pleiades*" v. *Page*, (1891) A. C. 259; 60 L. J. 65 L. T. 169.

Fraud must always be specially pleaded. In an action on exchange the defendant pleaded that the plaintiff was not a holder for value. It was held that he could not under that plea question of his being privy to a fraud. The only question for issue will be, did he give value for the bill?

Uther v. Rich, 10 Ad. & E. 784; 2 P. & D. 579.

In an action of trespass for breaking and entering the plaintiff the defendant pleaded that the plaintiff demised the close to him for a term of years, by virtue whereof he entered and committed the trespass. This is a good plea in confession and avoidance, for the plaintiff's title, subject to the effect of the demise.

Leyfield's Case, 10 Rep. 91 a; 3 Salk. 273.

Action of trespass for breaking and entering plaintiff's close that J. S. was seised in fee of the close and demised it to the plaintiff for a term of years by virtue whereof he entered, which is a trespass. This was held a bad plea. A traverse denying that the plaintiff's title was all that was necessary.

Argent v. Durrant, 8 T. R. 403.

For illustrations of confession and avoidance in a Reply see p. 253.

In confessing and avoiding, as in traversing, the plea must be neither too wide nor too narrow. It must be as broad as the claim to which it is pleaded, and justify an excuse the whole of it; or if it be intended to apply to only a part of such claim, it must be limited accordingly by

“As to so much of the Statement of Claim as alleges, &c.,” or “As to paragraph 4 of the Statement of Claim” Be careful not to make too wide an averment, whereby you will take on your shoulders an unnecessary burden, or too narrow an averment, which will fetter your hand at the trial

Illustrations.

In an action for a slander in these words, “Woor says that M’Pherson is insolvent,” it would be insufficient to plead that Woor had in fact said so, the defendant must allege and prove not merely what Woor said, but also that what he said was true

M’Pherson v Daniels, 10 B. & C. 263, 5 M. & R. 251

Duncan v. Thwaites, 3 B. & C 556, 5 D. & R 447.

In a plea of privilege it is unwise to allege that the defendant had just and reasonable grounds for believing the charges made against the plaintiff to be true. Such an averment may be intended only as a corollary to a plea of privilege (in which case it would be far better to plead that, “the defendant acted *bonâ fide* and without any malice toward the plaintiff”), but it runs dangerously near to a justification, and will either be struck out as immaterial (*Cave v Torre*, 54 L. T. 87, 515), or particulars will be ordered of the grounds of such belief.

Fitzgerald v. Campbell, 18 Ir. Jur 153, 15 L. T. 74

But see *Roberts v Owen*, 6 Times L. R. 172, 54 J. P. 295, *post*, p. 187, and

Alman v Oppert, (1901) 2 K. B. 576, 70 L. J. K. B. 745 *post*, p. 179.

In pleading the Statute of Frauds it is not necessary to plead any particular section. Where, however, the defendant had pleaded sect. 4, he was not allowed to amend or to avail himself of sect. 7.

James v. Smith, (1891) 1 Ch. 384; 39 W. R. 396, 63 L. T. 524; but see 65 L. T. 544.

Of. Gregory v. Toiquay Corporation, (1911) 2 K. B. 556.

OBJECTIONS IN POINT OF LAW

Either party may object to the pleading of the opposite party on the ground that such pleading does not set forth a sufficient ground of action, defence, or reply, as the case may be. Such an objection can only be raised where the fault is apparent on the face of the pleading to which exception is taken, and the fault must be something more than a mere imperfection, omission, or defect in *form*

Demurrers were abolished by rule 1 of Order XXV * But it was desirable, and indeed necessary, to preserve some form of objection in point of law, otherwise parties might incur great expense in trying questions of fact which, when decided, would not determine their rights Hence rule 2 of the same Order enacts that, "Any party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial " And rule 3 provides that, "If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just."

* *Special demurrers*, as they were called, i e, mere objections to the *form* of an opponent's pleading, were entirely abolished by the Common Law Procedure Act, 1852, the 50th section of which provides that "on such demurrer the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of, form "

On the argument the party who raised the point of law has the right to begin (*Stevens v Chown*, (1901) 1 Ch p 900) And for the purposes of the argument, he is taken to admit all the facts alleged in the pleading to which he objects (*Burrows v Rhodes*, (1899) 1 Q. B. p 821, *Anderson v. Midland Ry Co*, (1902) 1 Ch p 374) The Court will, moreover, take the whole record into their consideration, and give judgment for the party who, on the whole, appears to be entitled to it Thus, a plaintiff who objects to a Defence may find himself called on to defend the sufficiency of his Statement of Claim, and, if unsuccessful, judgment will be given for the defendant

No one is bound to take an objection in point of law, the rule cited above (Order XXV r 2) merely says that he shall be *entitled* to raise it by his pleading At the trial he may urge any point of law he likes, whether raised on the pleadings or not. This was decided on June 10th, 1886, by a Divisional Court (Day and Wills, JJ.) in the case of *MacDougall v. Knight and another* (not reported on this point) And it was also the law under the former system (*Per* Lindley, J, in *Stokes v Grant*, 4 C. P. D at p 28, *post*, p. 175) But if either party desires to have any point of law set down for hearing, and disposed of before the trial under the latter part of rule 2, he should raise it in his pleading by an objection in point of law. And having regard to the words of Order XXV. r 3, it is clearly worth while to raise on the pleadings any point of law which will substantially dispose of the whole action, as in *Mayor, &c of Manchester v Williams*, (1891) 1 Q. B 94.

Illustrations

It is a common error to suppose that where a man who has made two wills at different times revokes the second, he thereby revives the first will. Suppose a plaintiff in that belief propounds the first will the defendant would plead it was revoked by the execution of the second

will the plaintiff would reply that the second will was in its turn revoked. If the defendant joins issue on this, the cause would proceed to trial on an issue of fact which is wholly immaterial for the revocation of the second will would not (without more) re-establish the first; it would merely leave the testator intestate. The defendant should object that the Reply affords no answer to the Defence

Where special damage is essential to the plaintiff's cause of action, an objection can be taken which may dispose of the whole action, in the Form given in R. S. C., Appendix E., s. III. No 2 "The defendant will object that the special damage stated is not sufficient in point of law to sustain this action." Similarly, if no special damage be alleged, the defendant may object "that the matters disclosed in the Statement of Claim are not actionable without proof of special damage, and that none is alleged."

See also Precedents Nos. 88, 110.

CHAPTER XI

ATTACKING YOUR OPPONENT'S PLEADING

THESE, then, are the leading rules of our present system of pleading. They are clear, simple, and sensible, and, at the same time, they are elastic. Pleadings are no longer cast all in one mould, there is full scope for individuality. No one is entitled to dictate to his opponent how he shall plead. "No technical objection shall be raised to any pleading on the ground of any alleged want of form" (Order XIX r. 26). Moreover, "no application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity" (Order LXX r. 2). Hence any mere irregularity will be cured by your opponent's pleading over. And experienced pleaders often break the letter of these rules for the sake of clearness or brevity. Thus, though it is in general unnecessary to allege matter of law, yet it is sometimes convenient to do so, and it may make the statements of fact more intelligible and show their connection with each other. This is, indeed, done in the statutory forms in R. S. C., Appendices C., D., and E.. *e g.*, "The plaintiff is entitled to the possession of a farm and premises" (App. C, s. vii.) "The defendant is entitled to set-off" (App. D, s. iv, 5). There is no harm in this, if (as in both the cases referred to) the facts are also stated on which the proposition of law is based.

But what is a pleader to do when he is confronted by some flagrantly bad bit of pleading in flat violation of the rules?

Even then, the best thing he can do, as a rule, is to leave it alone. But there are exceptions. As Bowen, L. J., says in *Knowles v Roberts* (38 Ch. D. at p. 270), "It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right." His opponent's remedy in such a case is to apply to the Master at Chambers for further directions, and for this purpose he must give notice under Order XXX. r. 5.

Such application may be —

- (1) To strike out the whole pleading under Order XXV. r. 4,
- (2) To allow an objection in point of law to be argued before the trial under Order XXV. r. 2;
- (3.) To have certain paragraphs in a pleading struck out or amended under Order XIX. r. 27, or,
- (4.) For particulars.

But be careful how you advise any such application. You may materially increase the costs of the action, and yet reap no compensating advantage for your client, even though you succeed.

(1.) *Striking out your Opponent's Pleading*

The provisions of Order XXV. afford a prompt and summary method of disposing of groundless actions and of excluding immaterial issues. Under rule 4 of that Order a Master at Chambers has power to strike out any pleading which discloses no reasonable cause of action or answer, and to stay or dismiss

any action which is shown by the pleadings to be frivolous or vexatious. On such an application he can look only at the pleadings and particulars, not at any affidavit (*Johnston v Johnston*, 33 W. R. 239; but see *Kershaw v. Sievier*, 21 Times L. R. 40). The power conferred by this rule should only be used in "plain and obvious cases" (*Hubbuck & Sons v Wilkinson*, (1899) 1 Q. B. 86, * *Lea v Thursby*, 90 L. T. 265), and where no reasonable amendment would cure the defect (*Griffiths v London & St. K. Docks Co.*, 13 Q. B. D. p. 261, *Steeds v. Steeds*, 22 Q. B. D. p. 542). Moreover, apart from all rules and Orders, the Court has inherent power to stay every action which is an abuse of its process (*Reichel v. Magrath*, 14 App. Cas. 665; *MacDougall v. Knight*, 25 Q. B. D. 1, *Remington v. Scoles*, (1897) 2 Ch. 1; *Critchell v. L. & S. W. Ry. Co.*, (1907) 1 K. B. 860). Where either party to an action has made repeated frivolous applications to the judge or Master, the Court has power to make an order prohibiting any further applications by him without leave (*Grepe v. Loam*, 37 Ch. D. 168, *Kinnaird v. Field*, (1905) 2 Ch. 306. And see the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51),

* "Two courses are open to a defendant who wishes to raise the question whether, assuming a Statement of Claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order XXV. r. 2, the other is to apply to strike out the Statement of Claim under Order XXV. r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any Master or judge can say at once that the Statement of Claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." (*Ib.* at p. 91) "Order XXV. r. 4 is not intended to take the place of a demurrer, and it ought not to be applied to an action involving serious investigation of ancient law and questions of general importance" (*Per* Cozens-Hardy, M. R., in *Dyson v. A.-G.*, (1911) 1 K. B. at p. 414.) And see the remarks of Selborne, L. C., in *Burstall v. Beyfus*, 26 Ch. D. at pp. 38, 39; and of the Court of Appeal in *Worthington v. Belton*, 18 Times L. R. 438.

In re Chaffers, 13 Times L R 363, and *In re Jones*, 18 Times L R 476) But these extreme powers are but rarely exercised. The mere fact that the plaintiff is not likely to succeed in his action is no ground for striking out his Statement of Claim (*Boaler v Holder*, 54 L T 298) Hence, though you may think that your opponent's pleading discloses no cause of action or no defence to your claim, it by no means follows that you should at once apply to have it struck out or amended. You must apply promptly, if at all (*Cross v Earl Howe*, 62 L J. Ch. 342.) In the Chancery Division the application is usually made by motion to the judge in Court

(2) *Objection in point of Law*

Then, too, the same Order enables the defendant to raise by his pleading any point of law, and in a proper case to have it argued and disposed of before the trial (rr 2, 3, *ante*, p 168).

Where the matter is one of first impression, or where for any other reason the law on the point is not clear, it may be very desirable to argue an objection and settle the point of law before incurring the expense of a trial with witnesses. But in ordinary cases it is generally wiser to raise the objection on the pleading but not to apply to have it argued before the trial. The usual result of such an argument is that, if the defendant succeeds, the plaintiff obtains leave, on paying the costs of the argument, to amend his Statement of Claim, and it is better for the defendant that the plaintiff should be driven to such amendment at the trial in the presence of the jury. Hence, as a rule, it is best not to apply to have any point of law argued before the trial, unless the objection is one which will dispose of the whole action, and which cannot be removed by any amendment which the plaintiff can truthfully make.

You need not be afraid that, by omitting to apply, you throw away for ever one chance of success, that the objection, if not taken at once, cannot be taken afterwards. No doubt slight de-

fects, such as slips of the pen, careless omissions, informal pleading, &c, may sometimes be aided by pleading over, and may still more often be cured by verdict. But it is never worth while in these days to incur the cost of a motion or summons over some purely formal defect. All matters of substance, as my Lord Coke says, "will be saved to you." You should always bear in mind the good advice which that great judge deduced as a moral from "the first cause that he ever moved in the King's Bench"—

"When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff has no cause of action, yet take heed you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more perhaps will arise than you thought of, but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact, *ad ultimum*, and never at first demur in law, when, after trial of the matters in fact, the matters in law (as in this case it was) will be saved to you." (*The Lord Cromwell's Case*, (1581) 4 Rep. at p. 14.) This advice, though more than three hundred years old, is as sound now as it was in the days of Queen Elizabeth, in fact, owing to the liberal powers of amendment given by the Judicature Acts, its value has increased rather than diminished. Lindley, J., lays down the same rule in *Stokes v Grant*, 4 C. P. D. at p. 28. "If the defendant wants to avail himself of his point of law in a summary way, he must demur, but if he does not demur, he does not waive the objection, and may say at the trial that the claim is bad on the face of it." (And see *ante*, p. 169.) If, then, the facts are likely to prove in your favour, you should not, as a rule, apply under Order XXV. r. 2. But if at the trial you will be compelled to admit that you have no case on the merits, then by all means take advantage of any point of law you can.

(3) *Amending your Opponent's Pleading*

Under rule 27 of Order XIX., a Master at Chambers may order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. But it is not easy to obtain an order under this rule. One

2. On June 3rd, 1911, the plaintiff was desirous of buying a horse to ride and drive. And on that day the defendant offered the plaintiff a mare at the price of 120*l*, and in order to induce the plaintiff to purchase her at that price, the defendant warranted her quiet to ride and drive. The plaintiff then asked the defendant whether this was not the mare which had been sold by the defendant to a Mr. Thornton, and which that gentleman had returned to the defendant because she was a confirmed kicker. The defendant denied that the said mare had ever been sold to Mr. Thornton or returned by him, and declared that she was not a confirmed kicker, or a kicker at all.

3. The plaintiff was thereby induced to purchase the said mare from the defendant, and paid the defendant 120*l* for her, relying on the defendant's said warranties.

4. The said mare was not quiet to ride or drive. She was a kicker, and a confirmed kicker. She was the mare which had been sold to the said Mr. Thornton, and which had been returned by that gentleman to the defendant because she was a confirmed kicker.

5. The said mare was of no service to the plaintiff, on the contrary, she twice damaged a dog-cart belonging to the plaintiff by her kicking, and rendered it unfit for use. The plaintiff offered to return her to the defendant, but the defendant refused to take her back, and the plaintiff incurred trouble and expense in keeping her. On October 14th, 1911, the plaintiff sold the said mare at Aldridge's for 43*l*, and has incurred expense on the re-sale

[Particulars of special damage.]

And the plaintiff claims ———*l* damages

No 59

✓ WRONGFUL DISMISSAL.

1. Prior to April 16th, 1910, the defendant had entered into a contract with the S Local Board for the construction of a reservoir, &c, on ———

2. On April 16th, 1910, the defendant engaged the plaintiff as manager for the completion of the said contract and of all works connected therewith at a weekly salary of 3*l*. 10*s* from that date until the final settlement of accounts in respect of the same between the defendant and the said Board was effected.

he sought no relief on that ground, the allegations were struck out as scandalous and embarrassing

Brooking v Maudslay, 55 L. T. 343, 6 Asp M. C. 13.

. *Murray v Epsom Local Board*, (1897) 1 Ch. 35, 75 L. T. 579.

(4.) *Particulars*

But the most usual way of attacking your opponent's pleading is by applying for particulars.

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." (Order XIX r 7.) If, then, either party considers that his opponent's pleading does not give him the information to which he is entitled, his remedy is to reinstate the summons for directions in the Master's list, and apply for further particulars under this rule

"The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise." (*Spedding v. Fitzpatrick*, 38 Ch D 413) If your opponent has worded his pleading so vaguely that you cannot be sure what his line of attack or defence will be at the trial, it is worth while to apply for particulars, even though you think you can make a shrewd guess at his meaning It is safer to pin him down to a definite story, otherwise it will be open to him at the trial to give evidence as to any fact which tends to support his vague allegation. (*Dean and Chapter of Chester v. Smelting Corporation, Ltd.*, (1902) W. N 5, *Hewson v Cleeve*, (1904) 2 Ir. R. 536.) It is also most desirable to ascertain whether the plaintiff is relying on parol conversations or written documents as amounting to a misrepresentation or as establishing a contract Always ask for particulars of losses, expenses and other special damage.

party has no right to dictate to the other how he shall plead. And remember that "nothing can be scandalous which is relevant." (*Per* Cotton, L. J., in *Fisher v Owen*, 8 Ch. D. at p. 653.) The mere fact that an allegation is unnecessary is no ground for striking it out, nor is a pleading embarrassing merely because it contains allegations which are inconsistent or stated in the alternative. (*Child v Stenning*, 5 Ch. D. 695; *In re Morgan*, 35 Ch. D. 492.)

Unless the pleading as it stands is really and seriously embarrassing, it is often better policy to leave it unamended, you only strengthen your opponent's position by reforming and thus improving his pleading. But be careful in drawing the Defence not to aid the defect in the claim in any way, the less said about that part of the pleading the better. Do not admit it, if need be, traverse it in so many words, but, after such denial, avoid the whole topic, if possible, leaving the plaintiff's counsel to explain it to the judge at the trial, if he can

Illustrations.

"A defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it."

Per James, L. J., in *Davy v Garrett*, 7 Ch. D. at p. 486.

In an action to enforce the compromise of a former action, it is unnecessary and embarrassing for the plaintiff to set out in his new pleading all the facts on which he relied before, for he will not be allowed to try the former action over again.

Knowles v. Roberts, 38 Ch. D. 263; 58 L. T. 259

Allegations of dishonesty and outrageous conduct, &c., are not scandalous if relevant to the issue.

Christie v. Christie, L. R. 8 Ch. 499, 42 L. J. Ch. 544.

Rubery v. Grant, L. R. 13 Eq. 443; 42 L. J. Ch. 19; 26 L. T. 538

Millington v. Loring, 6 Q. B. D. 190; 50 L. J. Q. B. 214

But where a plaintiff in his Statement of Claim made allegations of dishonest conduct against the defendant, but stated in his Reply that

and for seven days' further time to plead after such particulars are delivered.

Particulars are now ordered much more freely than in former days. Look at such cases as *Gale v. Reed*, 8 East, 80, *Shum v. Farrington*, 1 Bos & Pul 640, *Burton v. Webb*, 8 T R 459, *Cornwallis v. Savery*, 2 Burr 772, and *Forsyth v. Bristowe*, 8 Ex at p. 350. In each of these cases particulars giving the information asked for would now at once be ordered. "The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial." (*Per Cotton, L. J.*, 38 Ch D 414.) Now we play with the cards on the table.

Illustrations.

If an agreement is alleged generally (e.g., "it was agreed between the plaintiff and the defendant that," &c.), particulars will be ordered of the alleged agreement, stating its date, and whether the same was verbal or in writing, in the latter case identifying the document.

Turquand v. Fearon, 48 L. J. Q. B. 703; 40 L. T. 543.

Where it is alleged that "the defendant represented to the plaintiff," &c., an order will be made for similar particulars of the alleged representation.

Seligmann v. Young, (1884) W. N. 93.

So where the plaintiff alleged that certain directors had instigated the defendant to do something, *Kay, J.*, held that the plaintiff ought to state whether such instigation was verbal or in writing, and if verbal by whom it was made, and if in writing the date of such writing.

Briton Medical, &c. Association v. Britannia Fire Association, 59 L. T. 888.

In an action for conspiring to induce certain persons by threats to break their contracts with the plaintiffs, the defendant is entitled to particulars, stating the name of each such contractor, the kind of threat used in each case, and when and by which defendant each such threat was made, and whether verbally or in writing; if in writing, identifying the document, but he is not entitled to the names of the workmen in the employ of those contractors whom it is alleged the defendant threatened to "call out."

Temperton v. Russell and others, 9 Times L. R. 318, 319.

Where directors plead under the Companies (Consolidation) Act, 1908, s. 84, that they *bonâ fide* believed their statements to be true and that they

had reasonable grounds for their belief, they will be ordered to deliver particulars of the grounds of their belief.

Alman v Oppert, (1901) 2 K. B. 576; 70 L. J. K. B. 745.

*Particulars of alleged adultery, specifying time and place of each act, were ordered in

Coates v Croyle, 4 Times L. R. 735; and in

Hartopp v. Hartopp, 71 L. J. P. 78, 87 L. T. 188.

Leave will be granted to the petitioner to deliver such particulars even though the respondent oppose the application.

E. v. E. (1907), 23 Times L. R. 364.

So particulars of cruelty were ordered in

Bishop v. Bishop, (1901) P. 325, 70 L. J. P. 93, 85 L. T. 173.

The defendant in an action for seduction, applied, before Defence, for particulars of the alleged immoral intercourse. But the Divisional Court refused to make any order unless he made an affidavit that he had not seduced the girl

Thomson v. Birkley, 31 W. R. 230, 47 L. T. 700; approved in

Sachs v Speilman, 37 Ch. D. at p. 304; 57 L. J. Ch. 658.

In a similar case, a Divisional Court declined to follow this decision, and ordered particulars

Kelly v Briggs, 85 L. T. Journal, 78.

But the principle of *Thomson v Birkley* was followed in

Knight v. Engle, 61 L. T. 780.

And in *Hanna v Keers*, (1896) 2 Ir. R. 226.

Particulars of the defence of "inevitable accident" were ordered in

Martin v. M'Taggart, (1906) 2 Ir. R. 120.

But now see *Toppin v. Belfast Corporation*, (1909) 2 Ir. R. 181.

Rumbold v. L. C. C., 25 Times L. R. 541.

Where a plaintiff claims a lump sum of money he must give particulars of the items of which it is composed.

Philipps v. Philipps, 4 Q. B. D. at p. 131, 48 L. J. Q. B. 135.

Where a bill has been delivered before action, giving items of work and labour done, and subsequently a writ is issued claiming a lump sum for such work and labour, the defendant is entitled to particulars showing how that lump sum is arrived at by reference to the several items of the bill.

Hall v. Symons, 92 L. T. Journal, 337.

Where the plaintiff gives credit for a lump sum, and sues for a balance, he must give particulars of the items of which such credit is composed.

Godden v. Corsten, 5 C. P. D. 17, 49 L. J. C. P. 112.

Whenever the plaintiff claims a lump sum for carriage, warehouse rent, work and labour done, and money paid, he will be ordered to give the items composing such lump sum, and to distinguish which sums are charged for carriage, which for warehouse rent, which for work and labour, and which for money paid, and to state when and to whom each such payment was made

See *Gunn v. Tucker*, 7 Times L R 280.

Where, however, the plaintiff, instead of claiming a specific sum, asks on reasonable grounds that an account may be taken of the moneys due to him, no particulars will as a rule be ordered, the object of the action being to obtain the necessary information from the defendant.

Augustinus v. Nerinckx, 16 Ch D. 13; 29 W R. 225; 43 L. T 458.

Blackie v. Osmaston, 28 Ch. D. 119, 54 L J. Ch. 473.

Merely asking for an account will not prevent the Court ordering particulars; but if the Court sees that an account must be taken, it will not order particulars.

Kemp v Goldberg, 36 Ch. D. 505, 36 W R. 278; 56 L. T 736.

Carr v. Anderson, (C A) 18 Times L R 206.

Where a railway company sued a customer for the carriage of numerous consignments of iron, and for other charges connected therewith, the company was ordered in the first place to deliver particulars showing the price charged for each consignment. From these particulars, when delivered, it appeared that various consignments were charged at different rates, some less and some higher than the maximum rate allowed for carriage by the Railway and Canal Traffic Acts, 1873 and 1888. Thereupon the Divisional Court (Denman and Wills, JJ.), acting on the analogy of the provision contained in sub-sect 3 of sect. 33 of the latter Act (51 & 52 Vict. c. 25), on June 23rd, 1891, ordered "that the plaintiffs do furnish further and better particulars as to each of the several specific rates mentioned in the particulars already delivered in the action, distinguishing the charges for conveyance from the terminal charges (if any), and from the dock charges (if any), and if any terminal charges or dock charges be included, specifying the nature and detail of the terminal charges or dock charges in respect of which they are made, and that such particulars be delivered within a month, and that there be no stay in the meantime." And this order was upheld in the Court of Appeal, Landley and Fry, L. JJ. (July 30th, 1891).

London & North Western Rail. Co. v. Lee, 7 Times L R. 603.

But see *Mansion House Association v. Great Western Rail Co*, (1895) 2 Q. B. 141; 64 L. J. Q. B. 434; 72 L T. 523.

In some cases the parties are bound to deliver particulars by express enactment..

Illustrations.

In an action under Lord Campbell's Fatal Accidents Act, the plaintiff must deliver with his Statement of Claim "a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

9 & 10 Vict. c. 93, s. 4, see Precedent, No. 19.

In an action for infringement of a patent, the plaintiff must deliver with his Statement of Claim particulars of the breaches complained of, and the defendant must deliver with his Defence particulars of any objections which he intends to urge against the validity of the patent.

Order LIIIA. rr. 13, 14, 16—18, see Precedents, Nos. 64, 92.

The plaintiff's particulars must state definitely which of his patents he alleges to have been infringed

Saccharin Corporation v. Wild, (1903) 1 Ch. 410, 72 L. J. Ch. 270, 88 L. T. 101.

Any person presenting a petition for the revocation of a patent must deliver with his petition particulars of his objections to the validity of the patent, and no evidence will, except by leave of the Court, be admitted in proof of any objection of which particulars have not been delivered.

Order LIIIA. r. 11.

In an action for infringement of copyright in a book, the defendant must give a similar notice of objections if he intends to dispute the copyright. See Precedent, No. 90.

5 & 6 Vict. c. 45, s. 16, Bullen & Leake, 5th edn., 872.

Where in a Probate action "it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the Court or a judge, no evidence shall be given of any other instances at the trial"

Order XIX. r. 25 (a).

There is another advantage in obtaining particulars from your opponent. It limits the issue. He is bound by his particulars, and cannot at the trial (without special leave, which will only be granted on terms) go into any matters not fairly included therein. (*Woolley v. Broad*, (1892) 2 Q. B. 317) Particulars thus "prevent surprise at the trial, and limit inquiry at the trial to matters set out in particulars.

They tend to narrow issues, and ought to be encouraged." (*Per* Watkin Williams, J, in *Thomson v Buckley*, 31 W R. 230; 47 L. T. 700.)

Illustrations.

A landlord brought an action of ejectment against his tenant, and gave as particulars of the breaches of covenant on which he relied as a forfeiture: "Selling hay and straw off the premises, removing manure, and non-cultivation." He was not allowed at the trial to give evidence that the defendant had mismanaged the farm by over-cropping, or by deviating from the usual rotation of crops. He was confined to the matters stated in the particulars.

Doe dem. Winnall v. Broad, 2 Man & G 523

In an action brought by a landlord against a tenant for not properly cultivating a farm according to the course of good husbandry and the custom of the country where the farm was situate, the declaration alleged that, according to the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow, and alleged as a breach that the defendant had more than one-half in corn, &c, &c. The defendant pleaded, traversing the custom as alleged in the declaration. At the trial the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood — *Held*, that the plaintiff had tied himself up to the precise custom as alleged in the declaration, and, having failed to prove it, was not entitled to recover.

Angerstein v. Handson, 1 Cr M & R 789, 1 Gale, 8

And see *Harris v. Mantle*, 3 T. R. 307, *post*, p. 200

So, too, whenever any special damage is claimed, but not with sufficient detail, particulars will be ordered of the alleged damage, *e.g.*, if the plaintiff alleges that certain customers have ceased to deal with him, he will be ordered to state their names. This is a very useful order, for if plaintiff cannot give the names, he will be compelled to strike out the allegation of special damage, and the summons should ask that it be struck out if such particulars be not delivered. If he give the necessary particulars, he will be bound by them, he will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly, either in his pleading or particulars.

Watson v. Metropolitan Tramway Co, 3 Times L. R. 273

See *ante*, p. 122

Whenever damage of any kind is an essential portion of the cause of action, it is "special damage" within the meaning of this rule. *E.g.*,

particulars have been ordered at Chambers of a "general loss of business" in a case similar to

Ratchliffe v. Evans, (1892) 2 Q. B. 524; 61 L. J. Q. B. 535; 40 W. R. 578; 66 L. T. 794.

Where the plaintiff in an action to restrain the infringement of his trade mark alleged that the defendant had induced "divers persons" to purchase his goods as and for those of the plaintiff, particulars were ordered of the names and addresses of such "divers persons."

Humphries v. Taylor Drug Co., 39 Ch. D. 693; 37 W. R. 192; 59 L. T. 177.

But see *Duke v. Wisden & Co.*, 77 L. T. 67.

It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make against him, which may be something very different from the true facts of the case. His opponent may know more than he does; in any event it is well to bind him down to a definite story. Particulars will be ordered whenever the Master is satisfied that without them the applicant cannot tell what is going to be proved against him at the trial.

Again, where the party applying is in other respects entitled to the particulars for which he asks, it is not a valid objection to his application that if the order be made it will compel the party giving them to name his witnesses, or otherwise to disclose or give some clue to his evidence. If the only object of the summons be to obtain particulars of the evidence on the other side, it should of course be dismissed as an improper application. (*Temperton v. Russell*, 9 Times L. R. p. 320.) But where the information asked for is clearly necessary to enable the applicant properly to prepare for trial, or where in other respects the application is a proper one, the information must be given, even though it discloses some portion of the evidence on which the other party proposes to rely at the trial (*Marriott v. Chamberlain*, 17 Q. B. D. 154, 161;

Zierenberg v. Labouchere, (1893) 2 Q. B. at pp. 187, 188, *Bishop v Bishop*, (1901) P 325), and even where the plaintiff is privileged from producing documents which would disclose such evidence (*Milbank v. Milbank*, (1900) 1 Ch. 376).

In certain cases, a party who is ordered to give particulars is allowed, before giving them, to interrogate his opponent or to obtain discovery of documents (*Whyte v. Ahrens*, 26 Ch D 717, *Leitch v Abbott*, 31 Ch D. 374) "It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars" (*Per Bowen*, L. J , in *Millar v Harper*, 38 Ch D at p. 112, *Edelston v Russell*, 57 L. T 927) But no hard or fast rule can be laid down to determine when particulars should precede discovery or discovery should precede particulars. Each case will depend on its own circumstances (*Waynes Merthyr Co. v Radford*, (1896) 1 Ch 29)

Illustrations.

A line can be drawn, though sometimes only with difficulty, between requiring a plaintiff to make a sufficient statement to prevent the defendant being taken by surprise at the trial, and requiring him to disclose the evidence on which he intends to rely Thus, where the plaintiff alleged that the defendants "knew or ought to have known, and must be taken to have known, the improper motives which actuated the directors," the defendants applied for particulars, stating what were the alleged improper motives, and how and in what manner they were known to the defendants Kay, J , made an order for particulars of the alleged improper motives which actuated the directors, but declined to make the rest of the order asked for

Briton Medical, &c Association v. Britannia Fire Association, 59 L. T 888

In any action of slander or slander of title, the defendant is entitled to particulars of the times when, and the persons to whom (and in some cases of the places where), the alleged slanders were published, if such details are not given in the Statement of Claim.

Roselle v. Buchanan, 16 Q. B. D 656, 55 L. J. Q. B. 376; 34 W. R. 488 , extending the decision in

Bradbury v. Cooper, 12 Q. B. D 94, 53 L. J. Q. B. 558.

Roche v. Meyler, (1896) 2 Ir. R. 35.

Each publication is a separate cause of action, and the defendant is therefore entitled to this information, although the plaintiff may thus be compelled to name some of his witnesses.

Humphries v. Taylor Drug Co., 39 Ch. D. 693, 59 L. T. 177.

If a libel be contained in a letter or other private document, the name of the person to whom each publication was made, and the date of such publication, must be stated in the pleading. This, however, is unnecessary in the case of a newspaper, prospectus, handbill, or other document widely disseminated. A person libelled in a newspaper cannot be expected to tell the proprietor the names of all who take his paper. That would be oppressive.

British Legal and United Provident Assurance Co. v. Sheffield, (1911) 1 Ir. R. 69.

Davey v. Bentinck, (1893) 1 Q. B. 185, 62 L. J. Q. B. 114, 41 W. R. 181, 67 L. T. 742.

Havard v. Corbett, 15 Times L. R. 222.

Nor can a plaintiff be compelled to give the names of the persons passing in the street at the time an alleged slander was uttered.

Wingard v. Cox, (1876) W. N. 106.

Where a slander was uttered in a public room, the plaintiff was ordered to give the best particulars he could of the names of the persons present at the time.

Williams v. Ramsdale, 36 W. R. 125.

Roche v. Meyler, (1896) 2 Ir. R. 35.

If no facts be stated in a plea of justification, particulars will be ordered of the facts upon which the defendant intends to rely at the trial in support of that plea, unless the charge is specific and precise.

Gordon Cumming v. Green and others, 7 Times L. R. 408.

Foster v. Perryman, 8 Times L. R. 115.

Zierenberg v. Labouchere, (1893) 2 Q. B. 183, 63 L. J. Q. B. 89.

Emden v. Burns, 10 Times L. R. 400.

So, particulars will be ordered of the facts on which the defendant will rely in support of his plea of fair comment.

Digby v. Financial News, Limited, (1907) 1 K. B. 502.

And discovery will be limited to the issues as narrowed by the particulars delivered.

Yorkshire Provident Co. v. Gilbert, (1895) 2 Q. B. 148; 72 L. T. 445.

Arnold and Butler v. Bottomley, (1908) 2 K. B. 151, 77 L. J. K. B. 584, 98 L. T. 777.

And the particulars delivered must go to justify the charges made in the libel or slander, and not some other collateral imputation.

Wernher, Bert & Co. v Markham, 18 Times L. R. 143, 763

When a plaintiff claims, as heir, he should in his Statement of Claim show how he is heir, if he does not, he must give particulars of his descent.

Palmer v. Palmer, (1892) 1 Q. B. 319, 61 L. J. Q. B. 236

Blackledge v Anderton, (1893) W. N. 112.

Application for particulars must be made with reasonable promptitude (*Gouraud v. Fitzgerald*, 37 W. R. 265) But the mere fact that the defendant has already delivered his Defence is no waiver of his right to particulars of the allegations in the Statement of Claim (*Sachs v Spielman*, 37 Ch. D. 295.)

It is no hardship on a party who has a good case to be ordered to give particulars. It is often a benefit to him, for it compels him to get his case up carefully in good time before the trial. It is also sometimes an advantage to have full particulars of his grievance, loss, expenses, &c., clearly stated in black and white, and laid before the judge with the pleadings.

At the same time, particulars will not be exacted where it would be oppressive or unreasonable to make such an order, as where the information is not in the possession of either party, or could only be obtained with great difficulty, or where the particulars are not applied for till the last moment. An order is often made for "the best particulars the plaintiff can give."

As a rule, particulars will only be ordered of an affirmative allegation. One cannot give particulars of a mere traverse or of a joinder of issue.

Illustrations.

A declaration alleged that the plaintiff was chosen and nominated a knight of the shire by the greater number of the forty-shilling freeholders present. It was objected that the plaintiff does not show the certainty of the number. But it was held that the declaration was "good enough,

without showing the number of electors, for the election might be made by voices or hands, or by such other way wherein it is easy to tell who has the majority and yet very difficult to know the certain number of them." And it was laid down that, to put the plaintiff "to declare a certainty where he cannot by any possibility be presumed to know or remember the certainty, is not reasonable nor requisite in our law."

Buckley v Rice Thomas (1554), Plowd. 118

In an action for malicious prosecution the plaintiff alleged that the defendant had prosecuted without any reasonable or probable cause. The defendant admitted that he prosecuted the plaintiff, but denied that he did so without reasonable or probable cause. The plaintiff applied for particulars of the defendant's reasonable and probable cause, but this application was refused. The Court did not see its way to order particulars of a traverse of the absence of something, without the help of an affidavit.

Roberts v. Owen, 6 Times L. R. 172, 54 J. P. 295

If the allegation in the Defence had been drafted affirmatively, *e.g.*, "the defendant had reasonable and probable cause for prosecuting the plaintiff," an order for particulars would perhaps have been made

See *Mure v Kaye*, 4 Taunt. 34.

Where the defendant on the face of his pleading disputes all the items of the plaintiff's claim, he cannot be made to give particulars stating which of them he really disputes. Where he alleges that all the prices charged by the plaintiff are unreasonable and excessive, he cannot be ordered to state to which items he objects.

James v Radnor County Council, 6 Times L. R. 240

Where the plaintiff has only one cause of action, but his claim consists of many items, and the defendant has paid money into Court generally to the whole claim, he will not, as a rule, be ordered to specify in respect of which items the payment into Court has been made. "It would be very unjust to make the defendant particularise how much he had paid into Court in respect of each item." *Per* Bramwell, L. J., in

Paraire v Lorbl (C. A.), 49 L. J. C. P. 481, 43 L. T. 427

Orient Steam Co. v. Ocean Insurance Co., 34 W. R. 442.

Hennell v. Davies, (1893) 1 Q. B. 367; 62 L. J. Q. B. 220.

The James Tucker, &c Co v. Lamport and Holt (1906), 23 Times L. R. 10

But the Court has a discretion in the matter, and in special circumstances will order such particulars.

Boulton v. Houlder, 19 Times L. R. 635; 9 Com. Cas. 75

Particulars will not be ordered of any immaterial allegation

~~*Cube v Torre*, 54 L. L. 515~~

Gibbons v. Norman, 2 Times L. R. 676.

The party who has obtained an order for particulars shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. (Order XIX. r. 8) But an order for particulars does not otherwise operate as a stay of proceedings, or give any extension of time, and rule 8 does not apply when a "peremptory" order has been made for the delivery of the pleading within a specified time. (*Falck v Axthelm*, 24 Q. B. D 174) Where it is the plaintiff who is ordered to give particulars, it may be made a term of the order that the action shall be dismissed, unless the particulars be delivered within the time named in the order (*Davey v Bentinck*, (1893) 1 Q. B 185)

It sometimes happens that a party who, in compliance with an order, has given all particulars then within his knowledge, subsequently discovers new matter which he desires to add to the particulars already delivered. In such a case the safer course is to apply for leave to deliver further particulars. For without such leave he has strictly no right to add anything to those already delivered and by which he is bound (*Yorkshire Provident Co. v Gilbert*, (1895) 2 Q. B 148, *Emden v Burns*, 10 Times L. R. 400.)

Amending your own Pleading

Now look at home. Your opponent may have raised some well-founded objection to your pleading. In that case you had best amend at once before it is too late.

A party has generally little difficulty in obtaining leave to amend his own pleadings, provided his application is not left to so late a stage of the proceedings that to allow an amendment then would be unjust to his opponent. "Whenever a Statement of Claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ" (Order XX. r. 4) And

3 The plaintiff entered into the employ of the defendant and served him as such manager until he was wrongfully dismissed, as hereinafter mentioned, and was and is, as the defendant well knew, ready and willing to continue to serve the defendant as such manager until such final settlement of accounts is effected

4 Yet the defendant, on October 8th, 1910, gave the plaintiff one week's notice to quit his employment, and wrongfully dismissed the plaintiff from his post of manager, and refused to retain the plaintiff in his service after October 15th, 1910, although the final settlement of accounts has not yet been effected between the defendant and the said Board

5 The plaintiff has thereby lost the salary which he would have derived from continuing in the defendant's service, and has been unable to obtain another situation, and has remained unemployed from that date until now

6 While the plaintiff was in defendant's service the defendant did not pay him the agreed weekly salary of 3*l* 10*s* regularly or at all, and the sum of 24*l* 10*s* was, on October 15th, 1910, and is now, due and payable to the plaintiff by the defendant for arrears of salary

And the plaintiff claims—

(i) 200*l* damages

(ii) 24*l* 10*s* for arrears of salary to October 15th, 1910

No 60

POINTS OF CLAIM IN A COMMERCIAL CASE

1 The defendant chartered the plaintiff's ship by charter dated May 1st, 1911

2 Lay days began at the port of loading on June 1st, 1911, when the ship entered the Avonmouth dock, and expired on June 10th, 1911. But the ship was not loaded till June 20th

The plaintiff claims 200*l*, being ten days' demurrage at 20*l*. a day

the plaintiff may without any leave amend his Statement of Claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for Reply, or, if no Reply be ordered, within ten days from the delivery of the Defence (Order XXVIII. r 2; and see *Roberts v Plant*, (1895) 1 Q B 597, *ante*, p 58) But these rules do not enable the plaintiff to add new parties or to increase the total amount claimed on the writ. For any such amendment leave is necessary, which can be granted in a proper case under Order XVI. r 11, or Order XVII rr 2 and 4, or Order XXVIII r 1 And a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations (*Weldon v. Neal*, 19 Q B D 394) Where the action has been brought on a substantial cause of action, to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim by including in it, for the first time, a trivial and merely technical cause of action, which such defence may not cover (*Dillon v. Balfour*, 20 L R. Ir. 600) In some cases the plaintiff may amend by adding a new defendant. (*Edward v Lowther*, 45 L J C P. 417) But a defendant cannot, as a rule, make a third person a defendant without the plaintiff's consent (*McCheane v. Gyles*, (1902) 1 Ch. 911; *Montgomery v. Foy, Morgan & Co*, (1895) 2 Q B. 321) A defendant, too, may amend a counter-claim or set-off (but not his Defence) without any leave, provided he does so before the expiration of the time allowed for answering the Reply and before such answer (Order XXVIII. r. 3) To amend his Defence he must always obtain leave. In all these cases, the party amending must pay all costs occasioned by the amendment, unless the Master orders otherwise. (Order XXVIII. r. 13)

CHAPTER XII

STATEMENT OF CLAIM

A STATEMENT of Claim should state the material facts upon which the plaintiff relies and then claim the relief he desires. As "pleadings now are to be merely concise statements of the facts which the party pleading deems material to his case," it is unnecessary to particularise the form of action in which the relief would in former days have had to be sought. To state what form the plaintiff's right takes is to state a conclusion of law, and it is always unnecessary now for either party to state conclusions of law in his pleading, the Court will draw the proper inference from the facts alleged (*Hanmer v. Flight*, 24 W. R. 346, 35 L. T. 127).

"Forms of action" are in fact abolished. It is now no longer necessary to state either on the writ or on the pleadings whether the plaintiff is suing in trespass or on the case, in detinue or in trover. This is a most important alteration. Formerly, everything turned on the form of action in which the plaintiff elected to sue. There were only so many "forms of action" recognised by the Court, and every plaintiff had to pin himself down to one of these. If he selected the wrong one, he would in the end be non-suited and have to pay the defendant's costs, although an action would have lain if the declaration had been differently drawn. If he sued on a money count and it turned out that there was a special contract, he was non-suited, and had to pay the costs of the first action before he could bring another on the special contract (See *White v. Gt. W. Rail. Co.*, 2 C. B. N. S. 7). Again, if he sued in trespass and trespass did not lie, the plaintiff was non-suited, although trover or detinue would lie. In all the

old reports the form of action is usually stated first in capitals And the Court never decided that *no* action lay on such a set of facts, but only that the action did not lie in that form Hence in some cases it was only by a costly process of elimination that a plaintiff could ascertain for certain which was his proper legal remedy In 1875 there were seven different forms of *personal* actions: debt covenant, assumpsit, detinue, trespass, trespass on the case, and replevin, there were three *real* actions * dower, writ of right of dower, and *quare impedit*, and one *mixed* action ejectment And each form of action (except that last mentioned†) had its appropriate form of declaration, one of these forms, and only one, had to be pleaded

This strictness had undoubted advantages It taught barristers to be precise And to this day it affords one of the best means of testing a point of law Ask a lawyer of the old school whether an action would lie, if one guest at a shooting party shot another by accident through the hedge, there being no negligence on the part of either, and he will approach the question by asking himself, would trespass lie? or must the injured man sue in case? But it was clearly bad for the suitors, who deserve some consideration, and it has accordingly been abolished Each party now states the facts on which he relies, and the Court will declare the law arising upon the facts pleaded If on those facts the plaintiff would have been entitled to recover in any form of action, he will now recover in the action which he has brought (See *Kelly v Metropolitan Ry Co*, (1895) 1 Q B at p. 946)

There are only two cases now in which a plaintiff can deliver a Statement of Claim without an order giving him leave to do so Both are before appearance

- (1) Where the writ is specially indorsed under Order III. r. 6 In that case "no further Statement of Claim shall be delivered, but the indorsement on the writ shall be deemed to be the Statement of Claim"

* The other real actions had been abolished by the 3 & 4 Will IV. c. 27.

† From 1852 to 1875, there were no pleadings in ejectment; but the plaintiff often had to deliver particulars.

(Order XX r. 1 (a)) If the plaintiff desires, in any way to add to or vary the statement indorsed on his writ, he must deliver an amended Statement of Claim, which he can do once without leave (Order XXVIII r 2)

- (ii.) Where the action falls within Order XIII r 12 (*ante*, p 6), and the defendant has not appeared There the plaintiff can, and must, without leave, file a Statement of Claim He must do so, even where he has indorsed his writ for trial without pleadings (*Greene v St John's Mansions, Ltd*, (1900) W. N 9.)

In every other case the plaintiff must obtain leave before he can deliver a Statement of Claim An order giving him such leave may be made under Order XIII r 5, or Order XVIII A r.3, or Order XXX r 1 or r. 8. It generally names a time within which the Statement of Claim is to be delivered. If, however, the order is silent on this point, the Statement of Claim must be delivered within twenty-one days from the date of the order, unless the time be extended by a subsequent order or by consent. (Order XX r. 1.)

Parties

Before drafting a Statement of Claim, counsel must carefully consider whether all necessary parties have been brought before the Court, and also whether it was necessary to bring before the Court all the parties named on the writ He has to show in his pleading a right of action in every plaintiff, and a liability on the part of each defendant. A mere misnomer on the writ can be amended without leave in the Statement of Claim But if it is desired to strike out a plaintiff or to add a fresh plaintiff or defendant, an application must be made under Order XVI rr 11 and 12, and strictly the writ should be amended too For the Statement of Claim and the

writ should correspond "in the names of the parties, in the number of the parties, and in the characters in which they sue and are sued" The plaintiff can, however, discontinue the action against any one or more of the defendants or withdraw any part of his complaint without any summons, merely by giving a notice in writing under Order XXVI. r 1. He must, of course, pay the costs occasioned by the matter so withdrawn. The Statements of Claim, delivered to the other defendants, who are kept as parties to the action, must be identical in their contents. If any party sues, or is sued, in a representative character (*e g*, as trustee in a bankruptcy, or as executor of a will) this fact must be stated in the title or heading of the Statement of Claim, as well as on the writ. (*In re Tottenham*, (1896) 1 Ch 628)

Illustrations

If any party to the action is improperly or imperfectly named on the writ, the misnomer should be corrected in the Statement of Claim, by inserting the right name with a statement that the party misnamed had sued or had been sued by the name on the writ, *e g*, "John William Smythe (sued as 'J. M. Smith')." The defendant can take no advantage of such an alteration, pleas in abatement for misnomer were abolished as long ago as 1834.

But where a defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it.

See *Williams v. Bryant*, 5 M. & W 447.

Mayor of Lynn's Case, 10 Rep 122 b

Joinder of Causes of Action.

Subject to the rules of Orders XVI and XVIII (as to which see *ante*, p 23), the plaintiff may unite in one action several causes of action without leave; so long as such joinder does not involve the addition of fresh parties. And he ought to join in the one action all causes of action which can conveniently be tried together, and so save costs.

Strictly, a plaintiff may not include in his Statement of Claim a new and independent cause of action of which there

is no hint on his writ. It is true that in a general indorsement it is not necessary to set forth "the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled" (Order III r. 2.) Hence "whenever a Statement of Claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ," *e g*, by claiming further relief. (Order XX r 4, *Large v Large*, (1877) W. N. 198, *Johnson v. Palmer*, 4 C P 'D 258.) But this does not entitle him to add a new and totally different claim, except by leave (*Cave v. Crew*, 62 L. J. Ch. 530, *United Telephone Co v Tasker*, 59 L. T. 852.) On the other hand, if a plaintiff in his Statement of Claim omits all mention of a cause of action or a claim for relief which is stated on his writ he will be deemed to have elected to abandon it (*Cargill v Bower*, 10 Ch D p 508; followed by Swinfen Eady, J, in *Lewis & Lewis v Durnford* (1907), 24 Times L. R. 64.)

A plaintiff may only include in his Statement of Claim causes of action which existed at the date of writ. He can recover damages accruing since writ from a cause of action vested in the plaintiff before writ. (Order XXXVI r 58.) But he cannot claim damages in respect of a cause of action, which has vested in him since the date of the writ against the same defendant. If he wishes to do that, he must issue a second writ, and then* apply to have the two actions consolidated, if they can conveniently be tried together.

A plaintiff should always avail himself of all his causes of

* Formerly only the defendant could apply to have two or more actions consolidated, but now either party may do so. (*Martin v Martin*, (1897) 1 Q B 429.) A plaintiff cannot, however, apply to have actions against different defendants consolidated, without the consent of all parties, unless the issues to be tried are precisely similar. (*Lee v Arthur* (1908), 100 L T. 61.)

action, and join as many of them as he can in one action (*E g.*, he should set out every covenant that there is any ground for believing broken, and allege every available breach of such covenant.) But the facts upon which each claim is founded should, so far as possible, be stated separately and distinctly. (Order XX. r. 7)

Illustrations

A repairing lease generally contains three concurrent covenants as to repairs —

- (a) A general covenant to repair
- (b) A covenant to repair on three months' notice.
- (c) A covenant to paint the outside once in every three years, and the inside once in every seven years

Each of these is distinct and severable from the others, and every breach of any one of them is a separate cause of action · therefore set out all three and allege that each is broken, as you may win on one, though you fail on the others. See Precedent, No 51.

If the plaintiff sues the defendant for fraud and proves negligence, he cannot recover, hence it is advisable, in such a case, to plead negligence in the alternative.

Connecticut Fire Insurance Co v. Kavanagh, (1892) A. C 473;
61 L. J. P. C 50, 67 L. T. 508.

Sometimes a plaintiff must elect between a claim for damages and a claim for an injunction

Gent v. Harrison, 69 L. T. 307.

By a deed of submission the defendant covenanted to perform the award when made, and also to do nothing to prevent the arbitrators from making their award. The plaintiff sued on the award, alleging that the defendant had not performed the award in this, that he had not paid the sum awarded. The defendant pleaded that before the award was made he had by deed revoked the authority of the arbitrators. The Court held that the defendant was entitled thus to revoke the authority of the arbitrators (as the law then stood, it is otherwise now · see sect. 1 of the Arbitration Act, 1889), and that the plea was an answer to the breach alleged, and gave judgment for the defendant. But at the same time they pointed out that the defendant's conduct in thus revoking the authority of the arbitrators was a clear breach of the defendant's covenant not to prevent them from making their award, and that the plaintiff would have won the action if he had alleged that as a breach.

Marsh v. Buteel, 5 B. & Ald. 507.

It is often desirable to commence a Statement of Claim with some introductory averments stating who the parties are, what business they carry on, how they are related or connected, and other surrounding circumstances leading up to the dispute. These are called *matters of inducement*, because they explain what follows, though they may not be essential to the cause of action. A good pleader always reduces such prefatory statements to a minimum, and states them as concisely as possible. Next should come the essential portions of the claim, *i e*, the statement of the plaintiff's right which he alleges has been violated, and then the statement of the breach or wrong complained of. Then comes the allegation of damage, and last the claim for relief.

This order should always be followed, in spite of the precedents set out in Appendix C to the rules of the Supreme Court of 1883. What can be more illogical than such a Statement of Claim as Appendix C, s v, No 10 "The plaintiff has suffered damage by breach of promise by the defendant to marry her on the —— day of ——" ? Here we have first the damage, then the breach, and last of all the promise. Surely this is "putting the cart before the horse." See Precedent, No 49.

Tort

In an action of tort it is unnecessary to set out the right which has been violated in cases where that right is not peculiar to the plaintiff in any way, but is one possessed by every liege subject. Thus, in actions of libel, slander, false imprisonment, or assault, the claim is merely a statement of a wrong. In other cases where the plaintiff claims a special right in himself (*e g*, an easement, or copyright), the right must be stated with all due particularity. This is specially so in actions for the recovery of land (See *ante*, p 123.) And remember that it is not sufficient to allege in a pleading that a right, or a duty, or a

liability exists, but the facts must be stated which give rise to such right or create such duty or liability (*Ante*, p 85)

Illustrations

Where a plaintiff claims a right of way he must define the course of the path, state its *termini*, and show how the right vested in him, whether by prescription or grant, but he is not bound to name the parties, or give the precise dates of lost grants

Harris v Jenkins, 22 Ch D. 481, 52 L J. Ch 437

Farrell v. Coogan, 12 L R. Ir. 14.

Pledge v. Pomfret, 74 L. J Ch. 357, 92 L T 560.

Palmer v. Guadagni, (1906) 2 Ch. 494, 95 L T 258.

In an action of libel or slander the precise words complained of are material, and they must be set out *verbatim* in the Statement of Claim.

Harris v Warre, 4 C. P. D. 125. 48 L. J C P. 310, 27 W R. 461, 40 L T. 429.

And see the remarks of Lord Esher, M. R., in *Darbyshire v Leigh*, (1896) 1 Q. B. at p 557

In an action of slander you should always aver, wherever there is any ground for doing so, that the words were spoken of the plaintiff in the way of his trade. A foundation should be laid for such an averment by alleging in paragraph 1 that "the plaintiff is a ———, carrying on business at ———, &c "

Foulger v. Newcomb, L. R. 2 Ex 327, 36 L. J. Ex. 169; 15 W R 1181, 16 L T 595

Contract

Where the action is brought on a contract, the contract must first be alleged, and then its breach. It should clearly appear whether the contract on which the plaintiff relies is express or implied, in the latter case the facts should be briefly stated from which the plaintiff contends a contract is to be implied (See Order XIX rr 20, 24, and Order XXI. r. 3.) If the contract be by deed, it should be so stated, if it be not by deed, then a consideration must be shown, which must not be a past consideration.

Wherever the contract sued on is contained in a written instrument, the pleader should shortly state what he conceives

to be its legal effect, he should not set out the document itself *verbatim* unless the precise words of the document, or some of them, are material. (Order XIX. r. 21.) It will be for the defendant, if he disputes the legal effect attributed to it by the plaintiff, to state his own version of the document, or, if he thinks fit, to set it out *verbatim* in the Defence, with an allegation that this is the contract referred to in the Statement of Claim.

The actual contract which was in force between the parties at the date of breach should be the one alleged. There is no need to go into ancient history. If there have at different times been different agreements between the parties, it is unnecessary to set out the original terms which have been dispensed with. It is sufficient to state the modified contract as it stood when the plaintiff's right of action attached (*Boone v. Mitchell*, 1 B & C. 18, *Carr v. Wallachian Petroleum Co.*, L. R. 1 C. P. 636.) And contingencies need not be stated, if the events upon which they were contingent never happened, for so they do not affect the plaintiff's right or title.

It is no longer necessary for a plaintiff to allege generally the performance of all conditions precedent, as was customary before the Judicature Act. Such an allegation is now implied in his pleading by Order XIX. r. 14. Where, however, the plaintiff is conscious that he has not performed a condition precedent, and has a good excuse for such non-performance, he should in his Statement of Claim state the condition, the non-performance and the facts which afford him his excuse, *e g*, that the defendant prevented or discharged him from performing it.

If either the consideration or the promise is in the alternative, this should be stated according to the fact. If the promise or covenant sued on contains an exception or proviso qualifying the defendant's liability, such exception or proviso should be stated; for it would be incorrect to state the contract

as an absolute one But if the promise or covenant sued on is absolute in itself and contains no exception or proviso, and no reference to any exception or proviso, it may be stated as an absolute contract, although there may be in a distinct part of the deed or instrument a proviso defeating or qualifying it in certain events For such proviso is in the nature of a defeasance, and must be set up by the defendant if the facts permit If, however, the subsequent clause is referred to by some such words as "except as hereinafter excepted," then strictly the exception or proviso ought to be set out in the Statement of Claim

Illustrations.

When the action is brought on a written contract the pleader should describe it as a contract in writing, and give its date, and name the parties to it, so as to identify the document If he merely states, "It was agreed between the plaintiff and the defendant," the defendant will apply for particulars.

Turquand and others v. Fearon, 48 L J Q B 703, 40 L T. 543.

It is not necessary for him, however, to state expressly that the written agreement was signed by the defendant, even though the contract sued on be one to which the Statute of Frauds or Lord Tenterden's Act, or the Sale of Goods Act, applies

Rust v. Hobson, 1 S & S 543

As to when a plaintiff should base his claim on a special contract, and when on a *quantum meruit* or an implied contract, see Precedent, No. 50, and

Head v. Baldrey, 6 A & E. 459, 2 N. & P 217

White v. Gt W Ry Co, 2 C B N. S 7, 26 L J C P 158.

The plaintiff sued the defendant for not repairing the demised premises pursuant to the covenant in his lease, which the plaintiff stated as a covenant to "repair when and as need should require", and issue was joined on a traverse of the deed alleged The plaintiff, at the trial, produced the deed in proof, and it appeared that the covenant was to repair "when and as need should require, and at furthest within three months after notice", the latter words having been omitted in the declaration This was held to be a variance, because the additional words were material and qualified the legal effect of the contract.

Horsefall v. Testar, 7 Taunt 385, 1 Moore, 89.

Where there are several covenants in the same deed, some of which are broken and some not, the plaintiff should, of course, omit all allusion to the covenants which he does not allege to have been broken. There is no need for him to set out the whole document. He should first of all set out all the covenants which he alleges have been broken in their order as they occur in the deed, and then allege separately the breach of each covenant in the same order.

Breach.

The breach of contract, of which the plaintiff complains, must be alleged in the terms of the contract, or in words co-extensive with the effect or meaning of it. (See Precedent, No 51.) If, however, to allege a breach in the very words of the covenant would be too general an averment, particulars of the breaches should be set out in the pleading. But be careful in so doing not to narrow unduly the general averment that the covenant has been broken.

In averring a breach, "and" must always be turned into "or," and "all" into "any." If the contract be to do more things than one, the plaintiff must either state expressly that the defendant has done none of them, or else set out precisely what and how much he has in fact done. And generally the rules as to traversing (*ante*, pp 157—161) apply to pleading a breach.

Illustrations

Action on a covenant. The breach was thus assigned "that the defendant has not used the farm in a husbandlike manner, but on the contrary has committed waste." It was held that the plaintiff could not give any evidence of the defendant's using the farm in an unhusbandlike manner, if it did not amount to waste.

Harris v. Mantle (1789), 3 T R 307

This case was cited with approval by Mr. Baron Pollock, and acted on in the *Property Investment Company of Scotland v. Lucas & Son*, on April 13th, 1886. The learned Baron said "The case of *Harris v. Mantle* (3 T R 307) was decided by one of the greatest lawyers (Buller, J) of

the day in my early time, and although it sounds like a technical decision, it is one of the most sensible decisions ever made."

And see *Doc dem. Winnall v. Broad*, 2 Man & Gr 523

Angerstein v. Handson, 1 Cr M & R 789, 1 Gale, 8, *ante*, p 182

Byrd v. Nunn, 7 Ch D 284, 47 L J Ch 1, *ante*, p 163

Collette v. Goode, 7 Ch. D. 842, 47 L J. Ch 370, 38 L T 504

If the covenant or promise be in the alternative, the pleader must allege that the defendant did not do either the one act or the other

Legh v. Lillie, 6 H & N 165, 30 L. J Ex 25

If the contract be to pay a sum of money, *e g*, 500*l*, the breach alleged must be not merely that the defendant did not pay 500*l*, the plaintiff must add the words "or any part thereof," or else state how much has been paid and give the defendant credit for that amount, claiming only the balance

So, again, if the promise be to pay on a particular day, the plaintiff must not merely allege that the defendant has not paid the money on that day, he must add the words "or at all."

If the covenant be to deliver up certain boats and masts and nets and tackle on a certain day, the breach must be assigned that "the defendant never delivered up *any* of the said boats *or* masts *or* nets *or* tackle"

Damages

As to the allegation of damage, the distinction between special and general damages must be carefully observed | General damage is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally

Special damage, on the other hand, is such a loss as the law will not *presume* to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore be always explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural and necessary consequence of the

defendant's act, or such a consequence as he in fact contemplated when he so acted. All other damage is held "remote"* In many cases, proof of special damage is essential to the right of action, in these the writ must not be issued till the special damage has accrued, and then it must be alleged with special care

No general rule can be laid down as to the precise degree of exactness necessary in a claim of special damage. "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry" (*Per* Bowen, L. J., in *Ratcliffe v Evans*, (1892) 2 Q. B. at pp 532, 533). And remember that a plaintiff who succeeds in recovering general damages may yet be ordered to pay the costs occasioned by a claim for special damage which he has failed to substantiate. (*Forster v Farquhar*, (1893) 1 Q. B. 564)

Matters in aggravation of damages may be pleaded in the Statement of Claim, as we have seen already, *ante*, p. 103

Illustrations.

A plaintiff cannot prove that he has lost particular customers, unless he states their names, either in his pleading or particulars. And the persons so named must as a rule be called at the trial to state why they ceased to deal with the plaintiff.

The plaintiff alleged that in consequence of the defendant's slander she had "lost several suitors." This was held too general an allegation, for

* See *Remoteness of Damage* in Odgers on The Common Law of England, Vol. II., pp. 1284—1291.

the names of the suitors, if there were any, could hardly have escaped the plaintiff's memory.

Barnes v. Prudlin vel Bruddeh, 1 Sid 396, Ventr 4, 1 Lev 261.

Where a plaintiff claimed generally for loss of his lodgers, he was not allowed to prove the loss of a particular lodger

Westwood v Cowne, 1 Stark 172.

In an action for nuisance the Statement of Claim alleged that the nuisance caused "loss of sleep, injury to health, and great personal discomfort to the plaintiff and his family" Held by Kekewich, J., that this was an allegation of general damage only and that the plaintiff could not give evidence of any special damage Damages 40s.

Lipman v Pulman, (1904) W N 139, 91 L. T. 132

But in some cases a plaintiff is allowed to allege generally a loss of business or custom, and to prove it, without having recourse to particular instances, *e.g.*, by showing that his receipts have diminished, or that he has done less business, compared with former years, in consequence of the defendant's conduct

Rose v Groves, 5 M & Gr 613, 12 L J C P 251

Ratcliffe v. Evans, (1892) 2 Q B. 524, 61 L. J Q. B. 535

In an action for an imprisonment, the plaintiff cannot prove as damage that he suffered in health, or was stinted of food in prison, unless he has charged it in the Statement of Claim.

Pettit v Addington, Peake, 62

Lowden v Goodrick, Peake, 46.

Claim for Relief

Every Statement of Claim must state specifically the relief which the plaintiff claims, either simply or in the alternative. The same cause of action may entitle the plaintiff to relief of different kinds. In addition to claiming the payment of a debt or damages, he may ask for one or more of the following kinds of relief.—

- (i) An injunction (p 205)
- (ii.) A mandamus
- (iii.) Possession of land
- (iv.) Delivery up of a chattel.
- (v) A declaration of right or title (p 209).

- (vi.) The appointment of a receiver (p 205)
- (vii.) An account
- (viii) Specific performance of a contract, &c

It is not necessary to ask for general or other relief, for this "may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for " (Order XX r. 6.)

Damages —In an action for unliquidated damages, it is not necessary to insert any specific figure as the precise amount of damages claimed (*per* Vaughan Williams, L J , in *London and Northern Bank, Ltd v George Neurnes, Ltd* , 16 Times L R p. 434, *cf* *Thompson v Gould & Co* , (1910) A C 409), except in a Divorce case (*Pegler v Pegler and Russell*, 85 L T 649) But where the plaintiff's claim is liquidated and can be ascertained exactly, the pleader should, of course, claim only the precise amount, with a sufficient margin for interest, if the plaintiff is entitled to any Where he cannot be exact, it is wiser to claim too much rather than too little, for if the jury find a verdict for a larger amount than the plaintiff claimed, that amount cannot be recovered without amending the record. The judge has power to make such an amendment, if he think fit (Order XXVIII r. 1, *Beckett v Beckett*, (1901) P. 85)

Equitable Relief —But while the common law Courts could only compensate an injured plaintiff by awarding him damages, or ordering his goods or land to be restored to him, Courts of Equity, even where recognizing and enforcing exactly the same primary rights and liabilities as the common law Courts, applied different remedies to protect and enforce them And much of the value of the Chancery system depended upon the efficiency of these remedies Where the common law could only award damages for a wrong when committed, equity could prevent its commission by injunction Where law

could only give damages for a breach of contract, equity could enforce its specific performance. Where law could give damages for fraud or breach of faith, equity could declare the property affected by it to be held in trust for the injured party—in fact, to be his property, or insist on an account being delivered of all moneys received. But now, by virtue of sub-section 1 of sect 24 of the Judicature Act, 1873, every kind of equitable relief can be claimed and given in an action in the King's Bench Division. And even where it is not claimed, yet if the right to it appear incidentally in the course of the proceedings, the appropriate relief will be granted.

Receiver—Thus, a plaintiff is, in a proper case, entitled to a receiver, even though he has not asked for one on his writ or Statement of Claim. (*Cf Salt v. Cooper*, 16 Ch. D. 544.) The Court has jurisdiction to appoint a receiver in all cases in which it appears to it to be just or convenient to make such an order, although the defendant may be in possession of the property (Judicature Act, 1873, s. 25, sub-s 8, *Gwatkin v Bird*, 52 L. J. Q. B. 263, *Foxwell v Van Grutten*, (1897) 1 Ch. 64, *John v John*, (1898) 2 Ch. 573; *Cummins v Perkins*, (1899) 1 Ch. 16), and will give the receiver possession of the property so far as is necessary for the preservation of the plaintiff's rights (*Charrington & Co, Ltd v Camp*, (1902) 1 Ch. 386). A receiver is an officer of the Court, not the agent of or trustee for the parties (*Boehm v Goodall*, 27 Times L. R. 106.)

Injunction—An injunction should be claimed whenever there is any reason to apprehend any repetition of the defendant's unlawful act. In such a case it must be averred that the defendant threatens and intends to repeat the unlawful act, unless such an intention is already apparent from the nature of the case or the facts pleaded (*Stannard v Vestry of St Giles*, 20 Ch. D. at p. 195). To set out circumstances

from which such an intention can be inferred would be pleading evidence.

Remember that a Statement of Claim supersedes the writ, hence if some special form of relief be claimed on the writ, and not in the Statement of Claim, it will be taken that so much of the claim is abandoned (*Cargill v Bower*, 10 Ch. D at p. 508, *Lewis & Lewis v Durnford* (1907), 24 Times L. R. 64)

Account Stated.

There are two kinds of an account stated —

(i) Where there are cross demands, *i e*, where A owes B. certain moneys and B. also owes A money In such a case, if A. and B meet, and either verbally or in writing state an account with items on both sides, and strike a balance, and agree on it, then, if the balance be in favour of B, B can sue for that balance on an account stated. And, *prima facie*, he can sue for nothing else except that balance all his other demands are now extinguished, are in fact paid, and the satisfaction of these is the consideration for A's implied promise to pay the balance It will, it is true, be open to A to show, if he can, that there was a mistake made in the figures, &c, for an account stated is never *conclusive* between the parties But the fact that some of the earlier items were barred by the Statute of Limitations is no reason why he should not pay the balance agreed on, for such earlier items are now paid (*Ashby v James*, 11 M & W. 542; and see *ante*, p 110)

(ii) Where the debt is all on one side, so that there are no cross-items which can be set off one against the other, and no balance to be struck Here all the parties can do, if they meet, is for B to add up the various items of A's indebtedness to him, and for A mournfully to acknowledge that he owes B the total sum One would have thought that this would be, at most, a mere admission by A. of the pre-existing causes of action against himself—a useful piece of evidence in any action for the former debts, but not in itself a cause of action. It has been decided, however, that such an acknowledgment or admission of liability is in itself a new cause of action; and, for want of a better name, it also is

called "an account stated" (*Knowles v Michel*, 13 East, 249, 250; *Brown v. Tapscott*, 6 M & W 123, 124) There must, of course, be an existing liability at the time the admission is made (*Lemere v Elliott*, 30 L J Ex 350) But, even so, I fail to see any present consideration for a new promise to pay (See the judgment of Alderson, B, in *Ashby v James*, 11 M & W at p 543) And, indeed, an account stated of this kind is not a new cause of action for all purposes it does not give the plaintiff another six years within which to sue, unless it be an acknowledgment in writing sufficient to satisfy the 9 Geo. IV. c 14, s 1 (*Jones v Ryder*, 4 M & W. 32) The old causes of action are not extinguished, and the plaintiff can sue on them, and on the account stated in the same action (See Precedent, No 33) The best instance of an account stated of this kind is an I O U

This action on an account stated must be carefully distinguished from a claim to have an account rendered, as to which see *ante*, p 40, and from the defence that all accounts between the parties have been settled, as to which see *post*, p 231, and Precedent, No. 81

Action on a Bond.

A bond is the acknowledgment of a debt in writing under the hand and seal of the debtor, who is then called the *obligor* It must be delivered to the creditor, who becomes the *obligee* Being under seal it requires no consideration to support it, and the previous simple contract debt, if any, merges in the bond It binds both the real and personal estate of the obligor (11 Geo IV & 1 Will IV. c 47, s 2; 44 & 45 Vict c 41, s 59, and see Precedent, No 48)

Bonds are of *three* kinds.—

(1) A "single bond," i.e., a bond without any condition. Such a bond now is rare.

(11) A "common money-bond," a bond given to secure the payment of a sum of money If A borrowed, say, 500*l* from B to be secured by A's bond, A would, on the face of the bond, acknowledge that he owed B 1,000*l*, but a condition would be annexed that if A paid on a day named 500*l*, with interest thereon at a specified rate, the bond should be void. In early days, if the condition was not performed to the letter, the whole penal

sum (the 1,000*l*) was at once recoverable. Then Equity interfered, and prevented the creditor from recovering more than he was entitled to under the condition. Later it was provided by the 4 & 5 Anne, c 16, that, in the case of a common money-bond, payment of the lesser sum, with interest and costs, should be taken in full satisfaction of the bond, although such payment was not in strict accordance with the condition. But if the arrears of interest accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty, either at law (*Wilde v Clarkson*, 6 T R 303, *Hatton v. Harris*, (1892) A C 547), or in equity (*Clarke v. Seton*, 6 Ves 411, *Hughes v Wynne*, 1 Mylne & Keen, 20), except in special circumstances, as where the obligor has delayed the creditor by vexatious proceedings (*Grant v Grant*, 3 Sim 340), and even in that case the excess can only be claimed against the obligor, not against subsequent incumbrancers (*Hatton v Harris*, *suprà*, but see *Knipe v Blair*, (1900) 1 Ir R 372). It was formerly the rule at common law for the plaintiff, in an action on a common money-bond, to claim on his declaration the whole penal sum, and leave the defendant to plead the condition and its due performance in reduction of liability. But now the plaintiff invariably indorses his writ with a claim merely for the lesser sum named in the condition with interest. Such a claim can be specially indorsed under Order III r 6 (*Gerrard v. Clowes*, (1892) 2 Q B 11, *Strickland v Williams*, (1899) 1 Q B 382, *In re Dixon*, (1900) 2 Ch 561). The date of the bond, the rate of interest reserved, and the period in respect of which interest is claimed, should be stated in the indorsement.

(iii) A bond under 8 & 9 Will III c 11, that is, any bond with a condition which is not a common money-bond. Bonds are frequently given, with conditions avoiding them on the due discharge of certain duties or the performance of other specified acts, agreed to be done by the obligor, or by someone for whom he is willing to be surety. A bond conditioned for the payment of a certain sum by instalments, or for the payment of an annuity, is within the statute of William III, it is not a common money-bond within the statute of Anne. (*Willoughby v Swinton*, 6 East, 550. *Walcot v. Goulding*, 8 T R 126). So any covenant with a clause making a penal sum payable on breach is within the statute of William III. In all these cases the whole penalty formerly

became due on breach of any part of the condition, and judgment might be had and execution issued thereon, subject only to the control of a Court of Equity, if the debtor applied to it for relief. But by the 8 & 9 Will III c 11, s 8, any plaintiff suing on such a bond was required to state (or *assign*) the breaches which had been committed by the obligor, and although judgment was still signed for the whole penalty, execution was allowed to issue only for the amount of damages actually sustained in consequence of such breaches, the judgment remaining as a further security for the damages to be sustained by any future breach (*Hurst v Jennings*, 5 B & C 650)

In an action on a bond within the statute of William it is still open to the obligee to claim the whole penal sum on his writ in the old common law way. But the more usual and proper method is for him to indorse his writ generally (*e g* . "The plaintiff's claim is upon a bond conditioned not to carry on the trade of a —," or "upon a bond given to secure the payment of an annuity of £—", R. S C App A III 4), and then, if the defendant appears and pleadings are ordered, to deliver a Statement of Claim, setting out the bond and condition, stating each breach, and claiming damages, as though the bond were an express covenant by the defendant to do the various acts specified in the condition. The writ cannot be specially indorsed (*Tutther v Caralampi*, 21 Q B D 414) If the defendant appears, he may pay money into Court, but to particular breaches only, not to the whole action (Order XXII r 1) If the defendant fails to appear, "no Statement of Claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute and in 3 & 4 Will IV c. 42, s 16" (Order XIII r 14) For the form of a suggestion of breaches, see Chitty's Forms, 13th edit, p 649. Judgment can then be obtained on proof of the service of the writ and of default of appearance, and a writ of inquiry will issue. A copy of the suggestion of breaches should be filed on issuing the writ of inquiry.

Declarations of Right or Title.

In former days, as we have seen (*ante*, p 191), questions of ownership were decided in *real* actions, questions as to posses-

sion in *mixed* actions But the real actions fell into disuse owing to the extreme technicality of their procedure, and the mixed action of ejectment was used to determine indirectly questions of title, under the guise of a decision merely as to the right to possession of the property Thus, if both A and B claimed to be seised in fee of Blackacre, and B was in possession of the land, A would not sue in his own name, for, if he did, he would have to bring a *real* action He pretended that he had demised Blackacre a few days previously to John Doe or Richard Roe, and this fictitious lessee would obligingly lend his name as plaintiff, and as he claimed no title in himself, but only a right to possession derived from the lease, he could sue in ejectment, and the action would be called *Doe dem A v B* The plaintiff would plead A's seisin, and the demise to himself: the defendant was not allowed to traverse the fictitious demise, but he would deny A's seisin, and so A's title to the land would become an issue in the action, and be judicially decided (See "A Century of Law Reform," p 214) But suppose both A and B claimed to be heir-at-law of C, who was admittedly seised in fee of Blackacre, and who had granted a lease of it to D for a term which had not yet expired, here neither A nor B was entitled to possession as against D, for the lease to him bound them both Hence neither could have recourse to an action of ejectment, some other indirect mode of raising the question would have to be found A would sue D for the rent reserved by C, and D would perhaps side with B and refuse to pay A the rent, on the ground that B was the true heir and had ordered D not to pay it to A But neither claimant could obtain a direct decision by itself that he was entitled to the reversion on D's lease, except in a real action, the Court of Chancery would not make a binding declaration of title, unless a right to "some consequential relief" was shown (*Rooke v Lord Kensington*, 2 K & J 753), and this practice was followed—with some hesitation—in the High Court after the passing of the Judicature Act, from 1875 to 1883 (*Cox v Barker*, 3 Ch D 370—372) But in October, 1883, it was clearly provided by Order XXV r 5, that "no action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not" And this is now the practice (*Hendry v.*

Turner, 32 Ch D 355, *Ellis v Duke of Bedford*, (1899) 1 Ch p 515, *Honour v Equitable Life Society*, (1900) 1 Ch 852, *Société Maritime v Venus Steam Shipping Co* (1904), 9 Com Cas 289) The Court may make a declaration, even where it refuses to grant an injunction, or to give any other relief (*Llan-
tudno Urban District Council v Woods*, (1899) 2 Ch 705, *West v Gwynne*, (1911) 2 Ch 1) And see Precedents, Nos 27, 74

Replevin

Replevin is the re-delivery to their owner of goods or cattle which have been taken from him, upon his giving security that he will commence and duly pursue an action against the person by whose orders they were taken, and return them should he fail in the action

The action generally arises where goods have been distrained for arrears of rent, or where cattle have been straying and doing damage, or where an animal is seized as a heriot In such cases, if the owner believes that the seizure was wrongful, he gives a formal notice to the registrar of the County Court of the district in which the goods or cattle were seized (formerly to the sheriff of the county) claiming their return He must, in such notice, state his intention of bringing an action, and his willingness to give adequate security, either by depositing money, or by executing a bond with sureties, and, in the latter case, he should name the persons whom he proposes as sureties The registrar fixes the amount for which security must be given, after notice to the seisor, the security is completed, either by depositing that amount in Court or by executing the bond, and the goods or cattle are returned to the owner, who must then commence an action of replevin (generally within one week), and prosecute it without delay (See 51 & 52 Vict c 43, ss 133—137.)

For a precedent of a Statement of Claim in replevin, see No 68, for Defences in such an action, see Nos 98 and 99 in the Appendix of Precedents

CHAPTER XIII

DEFENCE.

THE defendant's counsel, before drafting the Defence, should carefully consider the Statement of Claim, and the way in which the action is shaped against his client. Is any cause of action shown at all? Is the only cause of action shown frivolous and vexatious? If so, he may think it right to apply to strike out the Statement of Claim (*Ante*, p 172). Such an application should be made promptly—as a rule, before any Defence is delivered. Then is the claim properly pleaded? Is any portion of it embarrassing? Or are particulars necessary? Have claims been joined which cannot conveniently be tried together? If so, the defendant should apply to sever them under Order XVIII. rr. 1, 7, 8, or 9. Should the action be remitted to the County Court, under either s 65 or s 66 of the County Courts Act, 1888? Or is it from its nature one that ought to be referred, and has the plaintiff ever agreed in writing to submit the dispute to arbitration? If so, the defendant must at once, before delivering any pleading or taking any other step in the action, except appearing, apply to a Master to stay the proceedings, under sect. 4 of the Arbitration Act, 1889.

Illustrations.

A “step in the proceedings” in sect. 4 of the Arbitration Act, 1889, means some application to the Court by summons or motion, and does not include an application by letter or notice from one party to another, or by correspondence between their respective solicitors. Therefore,

merely writing to the plaintiff for further time to plead will not preclude the defendant from applying under this section.

Brighton Marine Palace and Pier, Ltd v Woodhouse, (1893) 2 Ch. 486, 62 L J Ch 697, 41 W R. 488, 68 L T. 667

Ives and Barker v. Willans, (1894) 2 Ch. 478, 63 L. J. Ch. 521; 42 W R. 483, 70 L. T. 674.

Cf. the remarks of Cave, J, in *Rein v Stein*, 66 L T. at p. 471.

Nor merely opposing a summons issued, or a motion made, by the plaintiff.

Zulmoff v Hammond, (1898) 2 Ch. 92, 67 L J Ch 370.

But if the defendant attends on the hearing of the plaintiff's summons for directions, and any order is made in favour of the defendant, such as an order for pleadings, or discovery, this is a "step"

County Theatres, &c., Ltd. v. Knowles, (1902) 1 K. B. 480.

Richardson v. Le Mantre, (1903) 2 Ch. 222; 72 L. J. Ch. 779.

So if on the hearing of such a summons the defendant gives an undertaking to furnish an account to the plaintiff, and then obtains an adjournment of the summons, this is a step, even though no order be actually made.

Ochs v. Ochs, (1909) 2 Ch. 121; 78 L. J Ch. 555; 100 L. T. 880.

Appealing from an order made against the defendant, under Order XIV., is a "step."

And so is an application for particulars.

Chappell v. North, (1891) 2 Q. B. 252; 60 L. J. Q. B. 554, 40 W. R. 16, 65 L T. 23.

Or for security for costs

Adams v. Catley, 40 W. R. 570, 66 L. T. 687.

The Assunta, (1902) P 150, 86 L. T. 660.

Or taking out a summons for further time to plead.

Ford's Hotel Co v. Bartlett, (1896) A. C. 1; 65 L. J. Q. B. 166, 44 W. R. 241, 73 L. T. 665.

And *a fortiori* the delivery of a Defence.

West London Dairy Society v. Abbott, 29 W. R. 584, 44 L. T. 376.

The defendant must also consider whether the proper parties have been placed on the record. He can no longer plead in abatement. (Order XXI r 20) If the defendant considers that the proper parties are not before the Court, his remedy is to take out a summons under Order XVI. r 11, to add or strike out or substi-

tute a plaintiff or a defendant (*Kendall v Hamilton*, 4 App Cas 504) If, for instance, he is sued alone for a debt due from his firm, he should apply to have his partners joined as co-defendants, if they are still alive and within jurisdiction And in every case where a plea in abatement in respect of non-joinder of a defendant could formerly have been pleaded with success, the defendant should (subject to the rules as to one or more persons representing all the parties, such as Order XVI rr 9 and 37) apply to the Master to add the party who ought to have been joined, the action, where necessary, being in the meantime stayed (*Pilley v Robinson*, 20 Q B D 155) Thus, if he can show a *prima facie* ground for saying that A is jointly liable with him on the contract sued on, the Master will make A a co-defendant on the terms that the plaintiff is not to be prejudiced thereby, and that the original defendant shall pay A's costs, if A is held not liable (*Fardell, &c Co v Basset*, 15 Times L R 204) The Master will make an order to add a defendant more readily than to add a plaintiff (*Wilson, Sons & Co v Balcarres Brook Steamship Co, Ltd*, (1893) 1 Q B 422, *Roberts v Holland*, (1893) 1 Q. B 665) Moreover, a fresh plaintiff cannot be added without his consent in writing (Order XVI r 11)

As soon as these preliminary questions are disposed of, the defendant's counsel must proceed to draft the Defence Special care is necessary in drafting this pleading For though a plaintiff may amend his Statement of Claim once without leave, a defendant can never amend his Defence without an order (see Order XXVIII rr 2 and 3), and leave to amend will be refused, if the defendant only applies for an order at the last moment, *e g*, on the day before the trial (*Kirby v Simpson*, 3 Dowl 791)

The defendant must state in his Defence every material fact on which he proposes to rely at the trial. He must deal specifically with every fact alleged in the Statement of Claim, either admitting or denying it, he may plead further facts in answer to those he admits, he may object to the whole pleading as insufficient in law, or he may rely on a set-off

or counterclaim (see Chapter XIV.) All these separate grounds of defence must be stated, as far as may be, separately and distinctly, especially where they are founded upon separate and distinct facts. (Order XX. r. 7.)

Any number of defences may be pleaded together in the same action, although they are obviously inconsistent. A defendant may "raise by his Statement of Defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in" Order XIX. r. 27, as to striking out embarrassing matter (*Per Thesiger, L. J., in Berdan v. Greenwood*, 3 Ex. D. 255). And a Defence is not embarrassing merely because it contains inconsistent averments (*Child v. Stenning*, 5 Ch. D. 695), provided such averments are not fictitious (*In re Morgan*, 35 Ch. D. at p. 496).

As to objections in point of law, enough has been said *ante*, p. 168. As to traverses, do not deny everything. It causes useless expense. Admit all you can. But when you traverse, traverse well and boldly.

Denials must be specific

"It shall not be sufficient for a defendant, in his Defence, to deny generally the grounds alleged by the Statement of Claim, but EACH PARTY MUST DEAL SPECIFICALLY WITH EACH ALLEGATION OF FACT OF WHICH HE DOES NOT ADMIT THE TRUTH, except damages" (Order XIX. r. 17.)

And in order that the pleader may fully understand what is meant by "dealing specifically," other rules are added.

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted" (Order XIX. r. 13.)

"When a party in any pleading denies an allegation

of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance." (Order XIX r. 19)

And instances are given.—

"In actions for a debt or liquidated demand in money, comprised in Order III r 6, a mere denial of the debt shall be inadmissible " (Order XXI. r 1)

"In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e g.*, the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note." (Order XXI r 2.)

"In actions comprised in Order III r 6, classes (A) and (B), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed." (Order XXI r. 3)

"If an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances " (Order XIX. r 19, *ante*, p 159)

These rules were expressly intended to prevent a defendant pleading the general issue, as it was called (*see ante*, p 84), and to make him "take matter by matter, and traverse each of them separately " (*Per* Thesiger, L J , in *Byrd v Nunn*, 7 Ch. D at p. 287) Hence a defendant may not now plead that "he denies specifically every allegation contained in the Statement of Claim " Still, in order to deny specifically, it is not necessary to write out every sentence in the Statement of Claim, and traverse it in detail It is sufficient, when dealing with matters of inducement or any other allegations which do not go to the gist of the action, to plead that "the defendant denies each of the allegations contained in paragraph 8 " This will have the same effect as copying out the whole paragraph and constantly inserting "not " But when the pleader comes to those allegations which are of the gist of the action, he must be more precise he must plead, "The

defendant never agreed as alleged," or "never spoke or published any of the said words," or "never made any such representation as is alleged in paragraph 2 of the Statement of Claim" (See Precedents, Nos. 76, 79, 86, 88, 100)

Illustrations.

"In actions for goods bargained and sold, or sold and delivered, the Defence must deny the order or contract, the delivery, or the amount claimed, in an action for money had and received, it must deny the receipt of the money or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff."

Order XXI. r. 3.

"If it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received"

Order XIX. r. 19.

Claim for work and labour done. The first paragraph of the Defence was a denial of any indebtedness whatever; the second paragraph pleaded payment, the third paragraph set up a special contract under which the work was done. Paragraph 1 was held bad within the above rules. The defendant should have shown why he was not indebted. He was, however, allowed to amend by linking paragraphs 1 and 3 together, the plaintiff having costs in any event.

Copley v. Jackson, (1884) W. N. 39.

There are two important exceptions to the rule that a defendant must deal specifically with every allegation of fact in the Statement of Claim which he does not admit * Both are legacies from the old procedure, the first is a very sensible and proper provision, but I fail to see any sufficient reason for the other exception.

* The rule itself contains a third exception in favour of infants, lunatics, and persons of unsound mind not so found by inquisition. There was from 1875 to January 1st, 1894, a fourth exception, certain public bodies and functionaries were entitled to plead "Not Guilty by Statute." But this right exists in very few cases now, it was abolished by the statute 56 & 57 Vict. c. 61, s. 2, wherever it was conferred by any public general Act.

(i) *Do not Plead to Damages*

“No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted” (Order XXI r 4) This rule applies to damage of all kinds, whether special or general, and whether the alleged damage is part of the cause of action or not (See the remarks of Hawkins, J, in *Wood v Earl of Durham* (1888), 21 Q B D at p 508, and of Smith, L J, in *Greenwell v Howell* (1900), 16 Times L. R at p. 236)

Illustrations

Action of trespass for chasing sheep, *per quod* the sheep died. It is not necessary to traverse expressly the dying of the sheep.

Leech v Widsley, Vent 54, 1 Lev 283

Action for not properly building a ship, according to covenant, whereby she was obliged to put back and was detained A plea “to so much of the declaration as relates to the detaining,” was held bad

Porter v Izat, 1 M & W 381, 1 Tyr & G 639

“The plea must be an answer to the action, there is no such thing as a plea to the damages”

Per Tindal, C J, in *Smith v Thomas* (1835), 2 Bing. N C. at p 378, 4 Dowl. 333

And see *Wilby v. Elston* (1849), 8 C. B 142, 18 L J C P 320

(ii.) *Possession of Land*

By Order XXI r 21, “No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff But, except in cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, *and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plain-*

tiff's Statement of Claim He may, nevertheless, rely upon any ground of defence which he can prove except as herein-before mentioned "

It is to the words in italics that I venture to take exception

The defendant in an action for the recovery of land is never bound to disclose his title or want of title The plaintiff must recover on the strength of his own title, not on the weakness of his adversary's title And no one would wish to disturb these settled rules of law But it does not follow that the defendant should be permitted to put the plaintiff to unnecessary trouble and expense by implicitly denying, under colour of this plea of possession, well-known and indisputable facts The plaintiff must set out his title in full detail, stating each separate link (*Philpotts v. Philpotts*, 4 Q B D 127) Why should not the defendant be called on to admit or deny expressly each of these allegations? He need not disclose his own title, but is it too much to ask him to admit for instance, that J S, some common ancestor, died in 1823? If he were made to admit or deny expressly each link in the plaintiff's claim of title, the issue would be narrowed down to one or two simple questions of fact, or perhaps to a mere point of law as to the construction of a deed or will, which could be taken direct to a Divisional Court in the shape of a special case Some facts in any event would be admitted, for the defendant would have the fear of Order XXI. r 9, before his eyes; and thus expense would be saved Whereas this is what now takes place the plaintiff delivers his claim, which invariably concludes with the statement that the defendant is in possession and refuses to deliver up possession to the plaintiff, &c Then, for his sole defence, the defendant pleads the very thing which the plaintiff has already said against him, viz, that he is in possession And the parties come into Court apparently to try as the sole issue in the action the one fact on which they are both agreed!

Under the plea that he is in possession the defendant may set up any legal defence, even the Statute of Limitations, without any notice to the plaintiff And to this plea no reply except a joinder of issue is possible (*Coppinger v Norton*, (1902) 2 Ir R 241.) But every equitable defence must be expressly pleaded

Special Defences

"The defendant must raise by his pleading all matters which show the action not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds" (Order XIX r 15) In all such cases the fresh facts on which the defence is based must be specially pleaded.

"When a contract, promise or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement, whether with reference to the Statute of Frauds or otherwise" (Order XIX. r. 20) The defendant must, moreover, distinctly specify in his pleading any condition precedent, the performance or occurrence of which he intends to dispute, otherwise the performance or occurrence of all conditions precedent necessary to establish the plaintiff's case will be admitted (Order XIX r. 14 See *ante*, p 101)

Illustrations

The defence that a contract is a wager within the Gaming Act of 1845, or that of 1892, must be specially pleaded, and the facts which are relied on to bring the transaction within either of those Acts must be stated.

Colborne v. Stockdale, 1 Sta 493.

Grizewood v Blane, 11 C B. 526, 21 L. J. C P. 46.

Wills v Lovick, (1901) 2 K B 195, 84 L T. 713.

So whenever the contract sued on is of a kind prohibited by statute

Bull v Chapman, 8 Ex 444, 22 L J. Ex. 257.

But where the illegality of the transaction on which the plaintiff bases his claim appears clearly on the evidence which he adduces at the trial, the Court will in a proper case take notice of the illegality, although the defendant has not pleaded this defence.

Windhill Local Board v Vint, 45 Ch. D. p. 357

Scott v Brown & Co, (1892) 2 Q. B. 724, 728, 732.

Gedge v Royal Exchange Assurance, (1900) 2 Q. B. 214

Connolly v. Consumers' Cordage Co, 89 L. T. 347.

Luckett v Wood (1908), 24 Times L. R. 617.

A plea that the contract sued on was subsequently altered in a material particular by an interlineation is a plea in confession and avoidance and must be specially pleaded

Hemming v Trenergy, 9 A. & E. 926, 1 P. & D. 661

Crediton (Bishop) v. Exeter (Bishop), (1905) 2 Ch. 455, 93 L. T. 157.

A surrender must be specially pleaded, whether it was by deed or by operation of law, in the latter case the facts must be stated which are alleged to constitute such a surrender

Foquet v. Moor, 7 Ex 870, 875, 22 L. J. Ex 35.

If a plaintiff sues in a representative capacity, the defence that he is not such executor or administrator must be specially pleaded. If it is not, the objection cannot be raised at the trial. (Order XXI. r. 5)

Hole v Bradbury, 12 Ch D 886, 48 L J Ch. 673.

In an action brought by a solicitor for his costs, the defence that he was not a duly qualified practitioner at the time the work was done must be specially pleaded.

Hill and Randall v. Sydney, 7 A. & E. 956.

And so must the defence that he did not deliver a signed bill of costs in accordance with sect 37 of the 6 & 7 Vict. c. 73

Lane v. Glenmy, 7 A. & E. 83.

Plea of the Statute of Frauds

"There is no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds" It is not necessary to plead any particular section, and it is wiser not to do so For if you specify sect 4, you will not be allowed to avail yourself of sect 7, unless the judge will give you leave to amend, which he refused to do in *James v. Smith*, (1891) 1 Ch 384 If the plaintiff sues on a written contract, and then at the trial seeks to rely on a parol agreement, the judge should either exclude all evidence of the parol agreement, or else allow the defendant to amend by

pleading the Statute of Frauds (*Bunning v Odhams*, 75 L T 602)

Plea of the Statute of Limitations

“ The plaintiff's cause of action, if any, did not accrue within six years before this suit, and the defendant will rely on the Statute 21 Jac I c 16, s 3 ” The objection that the action is brought too late must be raised by a special plea, even though it appear on the face of the Statement of Claim This was decided as long ago as 1636 (*Hawkings v Billhead*, Cro Car 404)

It is otherwise, however, in an action for the recovery of land There, if the defendant be in possession of the premises, he need not plead the Statute of Limitations at all, for it is not an equitable defence If, however, he likes to plead the statute, he should do so in this form — “ The plaintiff's claim is barred by the Real Property Limitation Act, 1874, and his right and title (if any) to the said land were extinguished by virtue of that Act and the 3 & 4 Will. IV c 27 ” (See *Dawkins v Lord Penrhyn*, 6 Ch D 323, 4 App Cas 59, 64, and *Tichborne v Wen*, 67 L T 735)

Former Proceedings

That the plaintiff brought a previous action and recovered damages against the same defendant for the same cause of action is a bar to any subsequent action, even though fresh damage has since arisen from the defendant's unlawful act, for the jury in the former action must be taken to have assessed the damages once for all, and the probability or possibility that this subsequent damage would follow should have been submitted to their consideration then This rule, however, does not apply to cases where special damage is essential to the cause of action, in such cases a second action can be brought if fresh special damage accrues from the same cause of action (*Darley Main Colliery Co v Mitchell*, 11 App. Cas 127, *Crumbie v Wallsend Local Board*, (1891) 1 Q B 503, *West Leigh Colliery Co v Tunnickiffe*, (1908) A C. 27)

So, too, a previous recovery against another person may be a bar to the present action, if the former defendant was jointly concerned with the present defendant in the very cause of action

now sued on * Thus, if A and B. be in partnership, a previous judgment recovered against A would be a bar to any action against B for the same cause of action, even though the judgment obtained against A be not satisfied, because both A and B ought to have been sued jointly in the first action (*Brown v Wootton*, Cro Jac 73, Yelv 67, *Brinsmead v Harrison*, L R 7 C P 547, *McLeod v Power*, (1898) 2 Ch 295) Where two are liable severally or in the alternative, judgment against one is no bar to an action against the other (*Morel Brothers v Earl of Westmorland*, (1904) A C 11)

So, if the former action was unsuccessful, this will also be a bar to a second action against the same defendant, unless, indeed, the plaintiff lost the former action only on some technical ground, and the judge, in giving judgment against him, expressly declared that he might bring a second action

The defence of *res judicata* cannot be raised, unless it is specially pleaded in the Defence (*Edevain v. Cohen*, 43 Ch D 187) And it must be clear that the cause of action is the same in both actions (See *Serrao v Noel*, 15 Q B D. 549)

Where, for any reason, the strict defence of *res judicata* is not applicable (*e.g.*, where the actions are not between precisely the same parties or persons suing in the same capacity), still, if the plaintiff is "suing substantially by virtue of the same alleged title," or if the issues raised in the second action are identical with those decided in the first, the Court will stay the second action (*Humphries v. Humphries*, (1910) 2 K B 531), at all events until the costs of the first action are paid (*Martin v Earl Beauchamp*, 25 Ch D 12, *MacDougall v Knight*, 25 Q B D. 1, *M'Cabe v. Bank of Ireland*, 14 App Cas 413) But not where the former action, though similar in its nature, was brought against a different defendant (*Le Mesurier v Ferguson*, 20 Times L R 32)

Estoppel

An estoppel must always† be specially pleaded, unless it appears on the face of the adverse pleading, when it is ground for an

* There are exceptions to this general rule (see, for instance, Order XIII. rr. 4, 6, Order XIV. r. 5, Order XXVII r. 3; *Walton v. Topakyan* (1905), 53 W. R. 657).

† It was formerly held that an estoppel by *record* or *deed* must be

objection in point of law, or unless there was no opportunity to plead it, as there was not in *Coppinger v Norton*, (1902) 2 Ir R 241. It cannot be pleaded by a stranger to the estoppel. A plea of estoppel must always be drafted with great care and particularity. It must state in full detail the facts on which the party pleading relies as constituting the estoppel, and should also specify the allegations which it is alleged the other party is precluded from proving.

Release

This defence must be specially pleaded (Order XIX r 15). If one of several joint creditors releases the debtor, all the other joint creditors are barred, unless the release was obtained fraudulently by collusion. So the release of one joint debtor releases all who are jointly liable with him, unless the right to release one without discharging the others was expressly reserved. But where the liability is several, the release of one does not affect the others, except possibly in the case of co-sureties. If the right of one co-surety to contribution be taken away by a release given to another co-surety, both are discharged (*Ward v National Bank of New Zealand*, 8 App Cas 755). See p 144.

Rescission

This must be specially pleaded. It is a useful plea in an action for breach of promise of marriage. See Precedent, No 76.

Lien

This defence must be specially pleaded, for it admits the plaintiff's property in the goods he seeks to recover, but states a good reason why he should, for the time, be deprived of the possession of them. It is thus a plea of confession and avoidance. Where it is pleaded, the Master may order the goods to be given up to the plaintiff on his paying into Court, to abide the event of the

specially pleaded, or it would not be available (*Bowman v. Rostron*, 2 A. & E 295, n.), but that an estoppel *in pais* might be given in evidence without being specially pleaded (*Freeman v. Cooke*, 2 Ex. 654, *Phillips v. Im Thurn*, 18 C. B. N. S 400). But now it is, I think, clear that the facts which are said to amount to an estoppel of any kind are material facts, and should be specially pleaded.

action, the full sum claimed by the defendant as the amount of his lien, together with a further sum for interest and costs (Order L r 8, and see *Gebruder Naf v. Ploton*, 25 Q. B. D. 13)

Accord and Satisfaction

There must be both. Neither an accord without satisfaction, nor satisfaction without an accord, will constitute a defence. An accord and satisfaction made by a third party on the defendant's behalf, and accepted by the plaintiff in discharge, will be a bar to the action (*Jones v. Broadhurst*, 9 C. B. 173) This defence could not formerly be pleaded to a claim on a bond or other specialty, because there was a maxim that a contract under seal could only be discharged by performance or some other contract under seal. But now an accord and satisfaction is an answer to an action on a specialty debt. (*Steeds v Steeds*, 22 Q. B. D. 537) See Precedent, No. 85.

Tender

"The defendant, before action, to wit, on March 23rd, 1910, tendered to the plaintiff the sum of £—, which the plaintiff claims in this action, but the plaintiff then refused to accept it. And the defendant now brings the said sum of £— into Court ready to be paid to the plaintiff " A plea of tender must show that the tender was before action (62 L. T. 151), and the sum alleged to have been tendered must be brought into Court (Order XXII. r. 3) This plea cannot strictly be pleaded to actions for unliquidated damages, whether sounding in contract or in tort (*Dearte v Barrett*, 2 A. & E. 82, *Davys v Richardson*, 21 Q. B. D. 202), unless there be some special statutory provision enabling a defendant to tender amends. But there is a difference between a payment into Court with a mere denial of liability, and a payment into Court with a plea of tender. A tender is a defence proper in the King's Bench Division. (*The Mona*, (1894) P. at p. 268) Hence, if the plaintiff take out of Court under Order XXII. r. 7, in satisfaction of his claim, money paid in with a plea of tender, he will not be entitled to his costs. (*Griffiths v Ystradfydwg School Board*, 24 Q. B. D. 307.)

Payment.

A plea of payment should state that the payment relied on was made before action, and give the date and amount of each instalment, if the money was paid on more than one occasion. There is no need, however, for a defendant to plead that he paid the plaintiff before action any sums for which credit is specifically given by the plaintiff in the Statement of Claim or in any particulars, because the plaintiff, in such cases, is considered as suing only for the balance claimed beyond the amount credited, and all pleas will be taken as addressed to such balance.

Payment into Court.

If the defendant has no case, and the damages claimed are unliquidated, it is sometimes the best plan (*e g*, in an action of breach of promise of marriage) to put in no defence at all, and to let judgment go by default. The damages will then be assessed by a sheriff's jury, who do not, as a rule, take an extravagant view of the case, and less publicity attends a hearing before the sheriff. But in other cases it is better for a defendant who has no defence to pay money into Court as amends. This he can do at any stage of the action, and the earlier the better. Whenever such payment is made before Defence, the defendant must give the plaintiff a notice in Form No 3 of R S C, Appendix B. And whether the payment into Court be made before, or at the time of delivering the Defence, the amount paid in must be signified in the Defence, which must also specify the cause of action in respect of which such payment is made (Order XXII r. 2).

Payment into Court is not strictly a defence, it is rather an attempt at a compromise. No such plea was known to the common law; it is entirely the creature of statute. In 1834 payment into Court was permitted in actions of contract, in 1844 in actions of newspaper libel, in 1852 in some actions of tort. But in 1875 payment into Court was for the first time permitted generally in all actions. And in all actions, except libel and slander, a defendant is now allowed to deny all liability, while, at the same time, he pays money into Court. Unless the defendant, on paying money into Court, expressly denies liability, such payment is considered to admit the plaintiff's claim (Order XXII r 1) to

(ii) IN ACTIONS OF TORT

No 61.

FRAUDULENT MISREPRESENTATION ON THE SALE OF A BUSINESS—
WARRANTY—RETURN OF DEPOSIT

1. In the months of March and April, 1910, the defendant was desirous of selling, and offered to sell to the plaintiff, a baker's shop, situate at 99, Queen Street, Chelsea, and the goodwill of the business carried on thereat. And the plaintiff entered into negotiations with the defendant with a view of purchasing the same.

2. In the course of such negotiations, viz, on April 11th, 1910, the defendant warranted and represented to the plaintiff that the said business had made a profit of 300% during the preceding six months.

3. The plaintiff was thereby induced to purchase the said shop and goodwill from the defendant, and then and there paid him the sum of 150% as a deposit in part payment of the purchase-money, relying on the truth of what the defendant had stated.

4. The defendant's statement was not true. The said business had not during the preceding six months made a profit of 300%, or any other sum. On the contrary, it had made a loss during that period.

5. The defendant was well aware of the facts stated in the preceding paragraph when he made the said statement, and he made the same fraudulently with the intention of inducing the plaintiff to purchase the said shop and goodwill, and to pay the said deposit on the faith thereof.

6. The plaintiff, on discovering that the defendant's said statement was false, repudiated the said purchase, and refused to complete the same, and the consideration for his said deposit of 150% has, therefore, wholly failed.

And the plaintiff claims—

- (1) The return of the said deposit of 150% with interest thereon at the rate of 5 per cent per annum from April 11th, 1910, till payment or judgment.
- (2) Damages for the said misrepresentation and breach of warranty.

the extent of the amount so paid in (*Kingham v Robins*, 5 M & W 94, *Hennell v Davies*, (1893) 1 Q B. 367), and the defendant cannot subsequently deliver any Defence denying such liability (*Dumbelton v Williams*, 76 L. T. 81) The plaintiff can, in that case, unless the Master otherwise order, take the money out of Court, either in satisfaction of his claim or not, in the latter case the plaintiff continues the action in the hope that the jury will find a verdict for a larger amount. But if the money be paid into Court with a denial of liability, the plaintiff can only take it out if he accepts it in satisfaction of his claim, if he goes on with the action, claiming more, the money must remain in Court (r 6) The plaintiff runs the risk of having to pay the defendant's costs, if the jury do not award him more than the sum paid into Court (see *post*, pp 326, 359)

Hence, if the defendant pays money into Court at all, he will be wise to pay in a good round sum The jury will find their verdict without reference to the amount paid in, indeed neither the fact that money has been paid into Court, nor the amount paid in, may now be mentioned to them (Order XXII r. 22) This rule is "most salutary and has worked well" (*Per Lopes, L. J.*, in *Williams v Goose*, (1897) 1 Q B at p. 473.) If one of two defendants pays a sufficient sum into Court, the plaintiff is entitled to have judgment against the other for his costs (*Penny v Wimbledon Urban District Council and another*, (1899) 2 Q B 72)

"Payment into Court shall be signified in the Defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein" (Order XXII. r 2, *Rowe v Kelly*, 59 L. T. 139, *The James Tucker Steamship Co., Ltd. v. Lamport and Holt* (1906), 23 Times L. R. 10) But the mere omission to specify such claim or cause of action will not render the payment into Court nugatory (*Benning v Ilford Gas Co*, (1907) 2 K. B. 290) One cause of action may consist of several items, still the defendant is entitled to pay money into Court generally to that cause of action. He will not, as a rule, be ordered to deliver particulars, specifying how much he has paid in to each item, or even in respect of which items the payment is made. (*Paraire v. Loibl*, 49 L. J. C. P. 481) But the Court has a discretion in the matter, and in special circumstances will order such particulars. (*Boulton v. Houlder*, 19 Times L. R. 635,

9 Com. Cas 75.) Nor will such general payment amount to an admission that something is due on every item (*Stevenson v Berwick*, 1 Q. B. 154, *Hennell v. Davies*, (1893) 1 Q. B. 367.) Observe, however, that "in an action on a bond under the statute 8 & 9 Will III c 11 (see *ante*, p. 208), payment into Court shall be admissible to particular breaches only, and not to the whole action." (Order XXII. r. 1.)

If the defendant has, before Defence, paid money into Court under Order XIV., he can now appropriate the whole, or such part as he thinks fit, of such money to the satisfaction of the plaintiff's claim. (Order XXII. r. 11.) A special form of plea is necessary in this case: "The defendant does not admit that he is under any liability to the plaintiff, but he has paid into Court the sum of £—, pursuant to the order of Master Chitty, dated May 15th, 1906, and made under Order XIV. And he now appropriates that sum to the satisfaction of the whole of the plaintiff's claim in this action, which he says it is sufficient to satisfy."

Payment into Court in Actions of Libel and Slander.

In actions of libel and slander, however, a defendant is not allowed to pay money into Court, if he at the same time deny liability. In those actions, if he pays money into Court at all, he must do so "by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made." (Order XXII. r. 1, *Brown v. Feeney*, (1906) 1 K. B. 563.) So if an action be brought against a husband and wife jointly for words published by the wife, the wife cannot deny liability if the husband pays money into Court. (*Beaumont v. Kaye and wife*, (1904) 1 K. B. 292.)

Where, however, the words are defamatory in their natural and obvious meaning, and the plaintiff by his innuendo puts on them a more defamatory meaning, the defendant may traverse the innuendo and at the same time pay money into Court, provided he makes it clear that the money is paid in to the words without the alleged meaning; as such a traverse is not in that case "a defence denying liability." (*Mackay v. Manchester Press Co.*, 54 J. P. 22; 6 Times L. R. 16; and see the judgment of Lord Esher, M.R., in *Davis v. Billing*, 8 Times L. R. at p. 59.) The form of such a plea is given *post*, Precedent, No. 96.

The same rule applies where the case falls within sect. 2 of Lord Campbell's Libel Act. Money must be paid into Court by way of amends at the time any plea under that section is delivered, or it will be treated as a nullity. (8 & 9 Vict. c. 75, s. 2.) Hence no defence denying liability can now be joined with such a plea. On the whole, however, it is safer and better for a defendant to pay money into Court under the Judicature Act, and not to rely on the special provision contained in Lord Campbell's Libel Act. (See *Oxley v. Wilkes*, (1898) 2 Q. B. 56, and *Sley v. Tillotson*, 62 J. P. 505.)

Fraud.

Where fraud is intended to be charged, it must be distinctly charged, and its details specified. General allegations, however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice. (*Wallingford v. Mutual Society*, 5 App. Cas. p. 697; *Laurance v. Lord Norreys*, 15 App. Cas. p. 221.) Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be drafted on insufficient material, nor without a marginal note warning the defendant that by adopting such an aggressive line of defence he may double or treble the amount of damages which he may ultimately have to pay.

Justification in Libel and Slander.

This also is a most dangerous plea, and should never be placed on the record without careful consideration of the sufficiency of the evidence by which it is to be supported. For particulars will probably be ordered (see *ante*, p. 137); and at the trial the strictest proof will be required (see *Leyman v. Latimer*, 3 Ex. D. 15, 352.) And if the plea be not proved, the defendant's persistence in the charge is some evidence of malice, and will always tend to aggravate the damages given against him. The defence cannot be raised without a special plea; and counsel should never draw such a plea without express instructions; and even then should always caution the defendant as to the risk he runs. As to justifying only a portion of the words, see *ante*, p. 105.

Where the defendant did not make a direct charge himself, but only repeated what A. said, a general plea that the words are true will be insufficient; he must plead and prove not only that

A. said so, but in addition that what A. said was true (*Duncan v. Thwaites*, 3 B. & C. 556, *M'Pherson v. Daniels*, 10 B. & C. 263.) The defendant cannot in any case plead that other words not set out in the Statement of Claim are true. (*Rassam v. Budge*, (1893) 1 Q. B. 571.)

Privilege

Formerly, it was unnecessary specially to plead privilege, this defence was available under the plea of Not Guilty, as it still is in criminal cases. But since the Judicature Act privilege must be specially pleaded, and the facts and circumstances on which the defendant will rely as rendering the occasion privileged must be set out either in the plea or in the particulars (*Simmonds v. Dunne*, Ir. R. 5 C. L. 358; *Elkington v. London Association for the Protection of Trade* (1911), 27 Times L. R. 329.) Any plea which wears a doubtful aspect, which may be either a plea of privilege, or a mere traverse, or a justification, will be struck out at chambers as embarrassing.

Equitable Defences.

Equitable defences may now, of course, be pleaded in the King's Bench Division. And so may equitable counterclaims, e.g., for specific performance, or rescission or rectification of an agreement (See Precedent, No. 81.) "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act." (Judicature Act, 1873, s. 24, sub-s. 2.) Equitable defences must be pleaded fully (*Sutcliffe v. James*, 40 L. T. 875; *Heap v. Marris*, 2 Q. B. D. 630), even in actions for the recovery of land.

Settled Account.

A settled account is a statement of the accounts between two parties which is agreed to and accepted by both as correct. It must be in writing; and it must be final, that is, it must show clearly what balance is due, or that no balance is due. An informal release of all demands may be a settled account. The fact that it is stated with the qualification "errors excepted" will not prevent its being a good settled account. It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party has accepted it as correct. But such acceptance need not be express; contemporaneous or subsequent conduct may amount to a sufficient acquiescence. (*Clark v. Glennie*, 3 Stark. 10; *Irvine v. Young*, 1 Sim. & St. 333.) The fact that the accounting party delivered up his vouchers to the other party is evidence that both regarded the settlement as final.

The plea of a settled account is a good defence to a claim for an account; and if coupled with an allegation that the balance shown by such account had before action been paid to the plaintiff, it is also a good defence to an action for money received by the defendant to the use of the plaintiff. In reply to such a plea, however, the plaintiff may allege that the settlement ought to be set aside, because the account contains errors of such a kind, or to such an extent, that it would be inequitable to hold him bound by it. He must, in his Reply or other pleading, specify the errors upon which he relies (*Parkinson v. Hanbury*, L. R. 2 H. L. 1, 19); and if he contends that such errors were made fraudulently, this must also be clearly stated. If he succeeds in proving fraud, the account will be wholly set aside, and the defendant must account *de novo* for every penny which he has received. The same result will follow where there is no fraud, if a considerable number of errors is shown in the account. Indeed, if the parties stand to each other in a fiduciary relation (*e.g.*, as solicitor and client, trustee and *cestui que trust*, guardian and ward), the plaintiff need only prove one "grave or substantial error," and the account will be taken as though there had been no settlement. (*Per* Davey, L. J., in *In re Webb*, (1894) 1 Ch. pp. 83—86.) Where there is no such relation, and no fraud, and the plaintiff cannot prove any large number of errors, he will probably only obtain

No 62

✓ FRAUDULENT MISREPRESENTATION AS TO DRAINS

1. In the month of April, 1910, the defendant was desirous of selling to the plaintiff a house known as No 37, ——— Street, S W , as a residence for the plaintiff, his wife, children, and servants

2. In order to induce the plaintiff to purchase the said house, the defendant represented to the plaintiff that the drains of the said house had been properly constructed and were then in perfect order, and in particular that the main drain of the said house was properly trapped at the end of the yard

3 The plaintiff was thereby induced to purchase the said house and did purchase it, relying on the truth of the defendant's statements, and paid the defendant ———l for the said house, and went to reside therein with his wife, children, and servants, in the month of May, 1910.

4 The said drains had not been properly constructed and were not then in perfect order, and the said main drain of the said house was not trapped at all at the end of the yard.

5 The defendant made the said statements well knowing them to be untrue, or with a reckless disregard as to whether they were true or false

6 In consequence of the defects of the said drainage, foul and noxious gases escaped from the drains into the said house, and injured the health of the plaintiff, his wife, children, and servants, and in the month of July and August, 1910, the plaintiff, his wife, and two sons, and a servant became very seriously weak and ill* and suffered pain, and were prevented from attending to their work and business, and the plaintiff has incurred expense in nursing and curing himself and them, and for medical attendance, and in and about the inspection and repair and re-construction of the said drains, and has otherwise been much injured and damaged

[Particulars]

And the plaintiff claims ———l.

* See *Forster v. Farquhar*, (1893) 1 Q. B 564, 62 L J. Q B 296, 41 W. R. 425, 68 L T 308

No 63

✓ INFRINGEMENT OF A PATENT

1 The plaintiff is the patentee and registered legal owner* of letters patent, No ———, of the year ——— [*state the number and year*], granted for an invention of “Improvements in ———” [*here state the title of the invention*]

2 The defendants have infringed the said letters patent in the manner appearing by the particulars of breaches delivered herewith

The plaintiff claims —

- 1 An injunction restraining the defendants, their servants and agents, from manufacturing, selling, offering for sale, or in any manner dealing with, any articles constructed in infringement of the said letters patent
- 2 Damages, or an account of profits, at the plaintiff's option
- 3 Delivery up, or destruction, of all articles in defendants' possession constructed in infringement of the said letters patent

No 64

PARTICULARS OF BREACHES

(*Delivered with the Statement of Claim pursuant to the Statute 46 & 47 Vict c 57, s 29.*)

The following are the particulars of the breaches of which the plaintiff complains in this action —

- 1 The defendants have infringed the plaintiff's letters patent, No ———, of ———, by making, selling, and offering for sale [gas stoves] [*specify the kind of article*], constructed in accordance with the invention described in the complete specification of the

* It is not necessary for the plaintiff to expressly aver that his invention is novel (*Amory v Brown*, L. R. 8 Eq. 663) And it would seem to follow from this decision that he need not aver that he is “the true and first inventor,” or that the privilege was conferred on him for a term not exceeding fourteen years. The letters patent having been granted, it will be presumed, in favour of the plaintiff, that they were rightly granted, and that all facts existed necessary to bring the case within sect 6 of the Statute of Monopolies (21 Jac. I c 3) See Order XIX r 25, *ante*, p 98. Should the defendant set up sect. 1 of that Act, then it will be necessary for the plaintiff to state these facts in his Reply.

leave to "surcharge and falsify," as it is called. Proof of one "definite and important error" will entitle him to this. (*Parkinson v. Hanbury, supra.*) It means that the account stands for what it is worth; but that either party may try and amend it, either by adding items in his favour which were wrongly omitted (that is, surcharging), or by striking out items against himself which were wrongly inserted (that is, falsifying). Whether an account shall be opened, or leave only given to surcharge and falsify, is a matter entirely in the discretion of the Court; and whenever one party is allowed to surcharge and falsify, the other may do so too. (See *Williamson v. Barbour*, 9 Ch. D. 529, 532; *Gething v. Keighley, ib.* 547.)

Matter arising since Writ.

"Any ground of defence which has arisen after action brought, but before the defendant has delivered his Defence, and before the time limited for his doing so has expired, may be raised by the defendant in his Defence, either alone or together with other grounds of defence." (Order XXIV. r. 1.)

"Where any ground of defence arises after the defendant has delivered a Defence, or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a Further Defence setting forth the same." (Order XXIV. r. 2.)

"Whenever any defendant in his Defence, or in any further Defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (which confession may be in the Form No. 5 of R. S. C., Appendix B., with such variations as circumstances may require), and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall either before or after the delivery of such confession otherwise order." (Order XXIV. r. 3; and see *Houghton v. Tottenham Rail. Co.*, (1892) W. N. 88.)

In olden times when the pleadings were each entered separately on the record, every entry after the first one was called a *continuance*. When the matter of defence arose after writ, but

before plea or continuance, it was said to be pleaded "to the further maintenance" of the action. When it arose after plea or continuance, it was called a plea of *purs darrein continuance*—since the last continuance (See 1 H & C 697)

Set-off and Counterclaim

Any defendant to an action may now plead a set-off or a counterclaim. A set-off is a statutory defence to a plaintiff's action; a counterclaim is substantially a cross-action. In certain cases the defendant may join a third person and make him a party to the counterclaim along with the plaintiff. These matters are fully dealt with in the next chapter.

Third Parties

Again, there may be some one from whom the defendant, if himself found liable in the action, has a right to demand contribution or indemnity. He may be sued as a surety, and, if found liable, may be entitled to contribution from a co-surety. He may be sued upon a contract which he made as agent for another person, and may be entitled to be indemnified by his principal. In such cases it is obviously desirable to bring in the third person against whom the defendant will ultimately have to seek his remedy, so that the decision as to the defendant's liability in the present action shall be binding and conclusive upon him when in a subsequent proceeding the now defendant seeks his remedy against him. This case is provided for by Rules 48—54 of Order XVI. And where the defendant in an action counterclaims, the plaintiff can serve a third-party notice on a person from whom he claims contribution or indemnity in respect of the counterclaim (*Levi v Anglo-Continental, &c Ltd*, (1902) 2 K B 481.) But the machinery provided by these rules does not work very satisfactorily; and the rights and liabilities of such third person, when brought in, are not very clearly defined.

Severing Defences

If counsel is instructed on behalf of more than one defendant, the question will arise, should he draw one Defence for all, or should they put in separate Defences? This depends on what their case will be at the trial. If for any reason they ought to be separately represented then, they must sever now; if they join in

one Defence, they cannot appear by different counsel at the hearing. If their interests are practically identical, this does not matter; but if they occupy different positions, hold different offices, or took different shares in the transaction, they had better sever; otherwise a special defence peculiar to one of them may be lost. (*Born v. Turner*, (1900) 2 Ch. 211.) For instance, the publisher, printer, or proprietor of a newspaper if sued for libel should never join in one Defence with the writer of the libel. But a special order as to costs may be made, if defendants improperly sever. (*In re Isaac*, (1897) 1 Ch. 251; *Bagshaw v. Pimm*, (1900) P. 148.)

Time.

The time within which the defendant must plead to a Statement of Claim varies in different circumstances. There are four distinct cases to be considered:—

- (i) Where the writ is generally indorsed, the plaintiff, as we have seen (*ante*, p. 65), must (except in Admiralty actions) take out a summons for directions promptly, after the defendant has appeared. And on the hearing of that summons, the Master, if he orders pleadings, generally directs within what time they shall be delivered. If, however, no time be specified in the order, the defendant must deliver his Defence within ten days from the delivery of the Statement of Claim. (Order XXI. r. 8.)
- (ii) Where the writ is specially indorsed under Order III. r. 6, the defendant must deliver his Defence within ten days from the last day on which he could have entered an appearance—unless in the meantime the plaintiff has served on him a summons either for directions or for judgment under Order XIV. (Order XXI. r. 6.) As soon as the defendant is served with either of these summonses, he must hold his hand and deliver no Defence until the summons is disposed of, even though the prescribed time for delivering the Defence will expire before the summons is returnable. (*Hobson v. Monks*, (1884) W. N. 8.) By taking out such summons the plaintiff practically extends the time for delivery of the Defence.

said letters patent and claimed in the [second and third] claiming clauses thereof

2 The defendants, on March 3rd, 1910, sold to one J S., of ———, Leeds, a [gas stove] constructed as aforesaid

3 The plaintiff is unable, until he obtains discovery, to give better particulars of the defendants' infringements, but will claim to recover full compensation for all infringements of the said letters patent committed by the defendants

[See Precedents Nos 91 and 92]

No 65

LIABILITY OF A LIGHTERMAN

1 The defendants are wharfingers and lightermen, carrying on business at the ——— Wharf, Wapping

2 On January 7th, 1896, the defendants, as such wharfingers and lightermen, agreed with the plaintiffs for reward in that behalf to safely tranship and carry from the ship "Rosalba," then moored in the Millwall Docks, to the said ——— Wharf, and there to land and warehouse, 197 bags of gum arabic, the property of the plaintiffs.

3 The defendants began to tranship and carry off the said goods, in pursuance of their said agreement, and, in doing so, they loaded the said goods upon a lighter called "The Thomas," which sank on January 8th, 1896, and the said goods were thereby greatly damaged *

4 The said lighter was, on January 8th, 1896, in the custody and control of the defendants, their servants, or agents, who so negligently and carelessly navigated, moored, and kept the said lighter that by reason thereof she sank, and the said goods were greatly damaged as aforesaid

5 The defendants warranted that the said lighter was a tight, staunch, strong lighter, in every way suitable and reasonably fit for loading and carrying the said goods without damage

6 The said lighter was not tight, staunch, or strong, and was not at all suitable or fit for loading or carrying the said goods, but leaked, let in water, and sank, whereby the said goods were greatly damaged as aforesaid.

* This count is based on the decision in *Liver Alkali Co v. Johnson*, L R 9 Ex 338

- (iii) Where the writ is specially indorsed, but leave has been given to the defendant to defend under Order XIV, he must deliver his Defence (if any has been ordered) within the time limited by the order, or if no time be thereby limited, then within eight days after the order. (Order XXI r 7)
- (iv) Where a Statement of Claim has been filed in default of appearance under Order XIII r 12 (as to which, see *ante*, p. 6), the defendant, if he wishes to deliver a Defence, must first appear, and then must deliver his Defence within ten days from the time when the Statement of Claim was filed. (Order XXI r. 8)

Such time may always be extended by the Court or a Judge (Order XXI r 6), or by consent under Order LXIV r 7. There is, as a rule, no difficulty in obtaining an extension for a week or so, unless the case is to be tried at the Assizes, and the commission day is drawing near. Then the plaintiff will rightly insist upon the defendant consenting to accept short notice of trial, if he require further time to plead. Under Order LXIV r 7, an extension of time may be granted, even after the time allowed for pleading has expired, but a wise defendant will not defer his application till so late a date.

Then again, a defendant may gain more time by applying for particulars. Merely taking out the summons does not of course operate as a stay or give any extension of time. But if he succeeds in obtaining an order for particulars, the Master will generally, if asked, extend the time to plead until, say, seven days after the delivery of the particulars ordered. If, however, the order be silent on the matter, the defendant will have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. (Order XIX r 8)

If the time expires and no Defence is delivered, the plaintiff may enter judgment by default. But, if he delays doing this, the defendant may put in a Defence after time, which will prevent judgment being subsequently entered, though the defendant will probably be ordered to pay any costs incurred through his delay. (Order XII r 22, *Gill v. Woodfin*, 25 Ch D 707, *Graves v Terry*, 9 Q. B. D. 170, *Kennane v Mackey*, 24 L R Ir 495)

CHAPTER XIV.

SET-OFF AND COUNTERCLAIM.

It may happen that, though the plaintiff was the first to commence litigation, yet the defendant has a claim of some kind against the plaintiff. If so, the question at once arises, Must the defendant issue a separate writ for this, or can he set up his claim in the plaintiff's action?

If the defendant's claim can be tried without inconvenience at the same time and by the same tribunal as the plaintiff's, the defendant will be allowed to plead in the plaintiff's action (a) in some cases a "set-off," (b) in all cases a "counterclaim."

The distinction between these two things, set-off and counterclaim, it is the object of this chapter to explain. Both are the creatures of statute-law. Both must be specially pleaded—in the Defence, if there is one. Even where there are no pleadings, if the defendant has not taken out a summons under Order XVIII. r. 3, he will not be allowed to rely on a set-off or a counterclaim, unless he has given notice to the plaintiff stating the grounds and particulars on which he relies. (Order XVIII. r. 5, Precedent No. 103.) Every set-off could be pleaded as a counterclaim, though the defendant would gain nothing and might lose something by so pleading it. But not every counterclaim can be pleaded as a set-off. For the form of a set-off, see Precedent No. 81, para. 5. For that of a counterclaim, see Precedents Nos. 82, 84, and 85.

Set-off.

A set-off is a statutory defence to the whole or a portion of the plaintiff's claim. At common law a defendant could not

any cross-claim against the plaintiff could not raise it in the plaintiff's action: he had to bring a cross-action. He might, it was true, when sued for the price of goods, give evidence of a breach of any warranty, express or implied, in reduction of the price. (See *Street v Blay* (1831), 2 B & Ad. 456.) But that was all. Then two statutes were passed in the reign of George II (2 Geo. II. c 22, and 8 Geo. II. c 24) which enabled a defendant in the plaintiff's action to plead what is known as a "set-off"—but only in certain cases. In the first place, only a debt of a liquidated amount could be set off; and it could only be set off in an action in which the plaintiff's claim was also liquidated. This is so still. Both debts must be due from and to the same parties in the same right, though a debt due from the plaintiff to a third person duly assigned before action by that third person to the defendant may now be set off (*Bennett v. White*, (1910) 2 K. B. 643). Both must be due at the date of the plaintiff's writ. Neither must be in the nature of a penalty. And originally both had to be *legal* debts. If the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not, before 1875, recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim; he had to bring a cross-action for the balance.

Illustrations.

A claim against the estate of a dead man cannot be set off against a debt due to him in his lifetime

Rees v. Watts, 11 Ex. 410, 25 L. J. Ex. 30.

A.'s solicitor had in hand 15*l.* belonging to A. A. became bankrupt. The solicitor then rendered certain professional services to A., the fair remuneration for which was 12*l.* 13*s.* 4*d.* A.'s trustee in bankruptcy sued for the 15*l.* —*Held*, that the solicitor could not set off the 12*l.* 13*s.* 4*d.* against the trustee's claim; for that was money earned since the bankruptcy.

Stumore v. Campbell & Co., (1892) 1 Q. B. 314; 61 L. J. Q. B. 463.

David v. Rees, (1904) 2 K. B. 435; 73 L. J. K. B. 729.

Lister v. Hooson, (1908) 1 K. B. 174, 79 L. J. K. B. 161; 98 L. T. 75.

Lord (Trustee of) v. G E Rail Co, (1908) 1 K. B. 195, (1908) 2 K. B. 54.

The defendant owed the plaintiff 45*l*. The defendant was executor of the estate of John Grimes, deceased. The plaintiff owed that estate more than 45*l*. —*Held*, that the defendant, when sued for his personal debt of 45*l*., could not set off the debt due from the plaintiff to John Grimes' estate.

Nelson v Roberts, 69 L. T. 352

An agent who has received moneys on behalf of a disclosed principal cannot deduct from the amount so received a debt due to himself personally from the same debtor.

Richardson v. Stormont, Todd & Co., Ltd., (1900) 1 Q. B. 701.

But a debt due from an agent can be set off against his principal, whenever the principal remains undisclosed and allows the agent to act as principal in the transaction.

George v. Clagett, 7 T. R. 359, 2 Sm. L. C. (11th ed.), 138

Montagu v. Forwood, (1893) 2 Q. B. 350; 42 W. R. 124

So a debt due from a *cestui que trust* can be set off against a claim made by a trustee on behalf of that *cestui que trust*.

Bankes v Jarvis, (1903) 1 K. B. 549, 72 L. J. K. B. 267

A debt accruing due after the commencement of the action is not within the statute of George II., and cannot be pleaded as a set-off, even to the further maintenance of the action.

Richards v. James, 2 Ex. 471, 17 L. J. Ex. 277.

The plaintiff could always plead in reply to a set-off that it was barred by the Statute of Frauds or Limitations, or was for any other reason not an actionable debt at date of writ.

Walker v Clements, 15 Q. B. 1046

Smith v. Betty, (1903) 2 K. B. 317, 89 L. T. 258.

Equitable Set-off.

In the Courts of common law only legal debts could be set off against each other. But in the Court of Chancery equitable claims for liquidated amounts were treated in the same way, if they created mutual credits between the same parties in the same right. (*Cavendish v. Greaves*, 24 Beav.

163.) Whenever there were cross-demands of such a nature that, if both had been recoverable at law, they would have been the subject of a set-off there, then, if either of the demands was a matter of equitable jurisdiction, a Court of Equity would enforce a set-off. (Story, 1436; *In re Paraguassu, &c Co.*, L. R. 8 Ch p. 261.) But Equity would allow no set-off between a debt due to or from the estate of a deceased person and a debt due from or to the executor or administrator personally. And it drew a rigid line at the death of the testator or intestate, and would not permit debts which only became payable since his death to be set off against debts due to him in his lifetime, or *vice versâ*. And now, since the Judicature Act, equitable claims and set-offs are recognised in every Division of the High Court.

Illustrations

A debt due from a plaintiff to an executor personally, cannot be set off against a debt due to the plaintiff from the testator's estate.

In re Dickinson, (1888) W. N. 94.

A purchaser who in an action for specific performance against an administratrix recovers costs against her personally cannot retain such costs out of the defendant's beneficial interest in the purchase-money.

Phillips v. Howell, (1901) 2 Ch 773, 71 L J. Ch. 13; 50 W. R. 73.

A debt which only accrued to the defendant after the death of a testator or intestate cannot be set off against a debt due from the defendant to the testator or intestate in his lifetime.

Newell v. National Provincial Bank, 1 C P D. 496.

Hallett v. Hallett, 13 Ch D 232; 41 L T. 725.

Ex parte Morier, 12 Ch. D. 491, 49 L. J Bkcy. 9.

So a debt due from a testator during his lifetime cannot be set off against a sum (e.g., money received from a policy on his life) which never was payable to the testator himself.

In re Gregson, 36 Ch D. 223; 57 L T. 250.

But the costs incurred by an executor in defending an action brought by a legatee for revocation of probate may be set off against the legacy.

In re Knapman, 18 Ch. D. 300, 50 L. J. Ch. 629.

Green v. Smith, 22 Ch. D. 586; 48 L. T. 254.

In re Akerman, (1891) 3 Ch. 212; 61 L. J. Ch. 34.

And a debt due to an administrator for costs incurred in an action brought by two next of kin, may be set off by him against the shares of such next of kin.

In re Jones, (1897) 2 Ch. 190, 76 L. T. 454, following
Taylor v. Taylor, L. R. 20 Eq. 155, 44 L. J. Ch. 718

Distinction between a Set-off and a Counterclaim

It is then only in a limited number of cases that a defendant is allowed to plead a set-off. The Judicature Act, which gave every defendant a very wide power of counterclaiming, did not alter the rules as to set-off. Whatever was a good set-off, either at law or in equity, in 1875, is a good set-off still: and nothing else is admissible as a set-off, though it may be an excellent counterclaim. The distinction is important, because it carries with it this result—that a set-off is still a defence proper to the plaintiff's action, while a counterclaim is practically a cross-action.

The student will often see the phrase: "And by way of set-off or counterclaim." But he must not assume that the two words are interchangeable or mean the same thing. The framers of the Judicature Act probably intended that the existing set-off should merge in the new counterclaim. They nowhere stated what the distinction was between the two: still less did they suggest that it was to be preserved. It has, however, been found necessary to maintain it. This is perhaps unfortunate, but it was difficult to avoid it. If a man die insolvent, the creditors only get a dividend on their claims, while the debtors to the estate must pay up their debts in full. If the same person be both a debtor and a creditor, he is naturally anxious to set one amount against the other, and pay up or receive the balance only. And this he may do, if he has a strict statutory right of set-off, not otherwise. If he has only a counterclaim for the debt due to him from the estate, he must pay up his debt to the estate in full, and prove for the money due to him in the administration proceedings, where he will get only a dividend on his claim*.

* In bankruptcy, however, or if a company is being wound up, a

Counterclaim

The modern counterclaim is entirely the creation of the Judicature Act, 1873. By virtue of sect 24, sub-sect. (3), of that Act every judge of the High Court of Justice and of the Court of Appeal now has power to grant to any defendant in respect of any estate, right, or title, legal or equitable, claimed or asserted by him, all such relief against the plaintiff as such defendant shall have properly claimed by his pleading to the same extent as if the defendant had brought an action against the plaintiff for the purpose, and the Court will give judgment in the plaintiff's action both on claim and counterclaim. The defendant's counterclaim need not relate to or be in any way connected with the plaintiff's claim, or arise out of the same transaction. It need not be "an action of the same nature as the original action" (*per* Fry, J, in *Beddall v Martland*, 17 Ch D p 181), or even analogous thereto. If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim.

Every cross-claim of whatever kind can now be pleaded as a counterclaim. It does not matter what the amount of it may be. It may be for either liquidated or unliquidated damages. (Order XIX r. 3.) It may exceed in amount the plaintiff's claim (*Winterfield v Bradnum*, 3 Q. B D 324); or it may be less than the plaintiff's claim. (*Mostyn v. West Mostyn, & Co*, 1 C P D 145) If the amount which is found due to

debtor to the estate or company may, it seems, set off a claim for unliquidated damages. (*Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, 663, 9 App Cas. 434.) But no set-off, whether liquidated or not, is allowed against a claim for calls (*In re Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70)

the plaintiff on his claim exceeds the amount established by the defendant on his counterclaim, the plaintiff will have judgment for the difference, if, however, the balance is in favour of the defendant, judgment will be given for the defendant for such balance, or for such other relief as he may be entitled to upon the merits of the case (Order XXI r 17)

In one respect a defendant who is pleading a counterclaim is in a better position than if he were seeking to enforce the same claim as a plaintiff in a separate action. No one can bring an action in our Courts against a foreigner resident out of the jurisdiction, except in the cases specified in Order XI (*Ante*, p 32) But if that foreigner commences an action here, and so brings himself within the jurisdiction of our Courts, he is liable to any counterclaim that can conveniently be tried with his claim. And if the counterclaim overtops the plaintiff's claim, the defendant may recover and enforce judgment against him for the balance, unless the plaintiff be an independent state or sovereign prince, as to which, see *post*, p 248 (*South African Republic v La Compagnie, &c* , (1897) 2 Ch 487, (1898) 1 Ch 190)

Illustrations

An equitable counterclaim can now be raised in an action of law, and a legal counterclaim in a Chancery suit

Fleming v Loe, (1901) 2 Ch 594 , 70 L. J. Ch 805

"A claim founded on tort may be opposed to one founded on contract, or *vice versâ*." *Per* Cockburn, C J., in

Stooke v. Taylor, 5 Q. B. D. p 576.

In an Admiralty action *in rem* for salvage services the defendant may counterclaim *in personam* for damages for breach of a charter-party

The Cheapside, (1904) P. 339 , 73 L. J. P. 117, 53 W. R. 120, 91 L. T. 83

It is only where the defendant seeks to bring in some person who is not already a party to the action, and make him defendant to the counterclaim, that the relief for which the defendant asks must relate to or be connected with the original subject of the action

Judicature Act, 1873, s 24, sub -s 3, *post*, p 245

Barber v Blaisberg, 19 Ch D. 473, 51 L. J. Ch 509

S. F. Edge, Ltd. v. Wengel (1907), 97 L. T. 447

In an action of slander, the defendant may counterclaim for damages for a slander on the defendant uttered some time previously by the plaintiff, though it has nothing to do with the slander on which the plaintiff is suing.

Quin v. Hession, 4 L. R. (Ir) 35, 40 L. T. 70.

To an action on a solicitor's bill of costs, the defendant may counterclaim for negligence.

Lumley v. Brooks, 41 Ch. D. 323, 58 L. J. Ch. 494.

Even a cause of action which has accrued to the defendant since the plaintiff issued his writ can now be pleaded as a counterclaim.

Beddall v. Martland, 17 Ch. D. 174, 50 L. J. Ch. 401

A counterclaiming defendant is in no way limited to a claim for damages. The Court will give him judgment for "such relief as he may be entitled to upon the merits of the case." (Order XXI. r. 17)

Illustrations

A defendant may by his counterclaim ask for a declaration of his rights, or for relief against forfeiture, or for a vesting order under sect. 4 of the Conveyancing Act, 1892.

Adams v. Adams, 45 Ch. D. 426, (1892) 1 Ch. 369.

Warden, &c. of Cholmeley's School v. Sewell, (1893) 2 Q. B. 254.

In a vendor's action for specific performance the defendant may counterclaim for the review of a previous decision as to the title

Scott v. Alvarez, (1895) 1 Ch. 596, 64 L. J. Ch. 376.

In an action for the infringement of the plaintiff's patent the defendant may counterclaim for the revocation of the plaintiff's patent, or for damages for the infringement by the plaintiff of the defendant's patent.

Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 32.

In certain cases, a defendant may, even before delivering his counterclaim, apply for an *interim* injunction or for the appointment of a receiver to protect his interests

* *Carter v. Fey*, (1894) 2 Ch. 541, 63 L. J. Ch. 723; 70 L. T. 786.

Collison v. Warren, (1901) 1 Ch. 812, 70 L. J. Ch. 382; 84 L. T. 482

A counterclaim is governed by the same rules of pleading as a Statement of Claim, and the Reply to it by the same rules as a Defence (See *post*, p. 259) All the facts relied

on by way of counterclaim must be stated in numbered paragraphs under the heading "Counterclaim," so as to distinguish them from the facts alleged by way of defence. If any of the facts on which the counterclaim is founded have been already stated in the Defence, they need not be re-stated in the counterclaim, but may be incorporated by reference, thus "And by way of counterclaim the defendant repeats the allegations contained in paragraphs 3, 4, 5, and 8 of the Defence" A counterclaim may comprise several distinct causes of action, but the facts on which each cause of action is founded must be stated, as far as may be, separately and distinctly, and the relief prayed stated specifically, either simply or in the alternative. (Order XX. rr 6, 7) And the several causes of action must be such as could properly be joined in one independent action (*Compton v Preston*, 21 Ch. D 138.) The provisions of Order XVIII apply to the joinder of various claims in a counterclaim

Ample provision is made to protect the plaintiff from inconvenient or improper counterclaims. If he can show that the counterclaim is one which cannot be conveniently disposed of in the pending action, or ought not to be allowed, the Master will strike it out under Order XIX r 3, or exclude it under Order XXI r 15, leaving the defendant to bring a cross-action. If the counterclaim is scandalous, and therefore an abuse of the process of the Court, it may be disallowed either under Order XXV. r 4, or under the inherent power of the Court. If it discloses no valid cause of action, it can be struck out under the last-mentioned rule, or objection may be taken to it in point of law under Order XXV r 2. It must be properly pleaded, or it may be struck out as embarrassing under Order XIX r 27, or further particulars demanded under Order XIX. r 7

A counterclaim must always claim relief against the plaintiff. A pleading which asks no cross-relief against a plaintiff either alone or with some other person is not a

counterclaim " (Per Jessel, M R, in *Furness v Booth*, 4 Ch D. p 587.) And it must be a claim against the plaintiff in the same capacity as that in which he sues

Illustrations.

To a joint claim by two plaintiffs a separate counterclaim against each of them will be allowed

M S & L Ry. Co and another v Brooks, 2 Ex D 243.

And on a counterclaim against two plaintiffs, the defendant may recover judgment against one

Hall v. Fairweather, 18 Times L. R. 58.

If one member of a firm sues for a debt due to him personally, the defendant may counterclaim for a debt due to him from the firm; and can make the plaintiff's partner a party to the counterclaim or not, as he pleases. If the defendant does not join the partner, the plaintiff can subsequently apply to add him.

Eyre v Moreing, (1884) W. N. 58

Where a plaintiff brought an action against a married woman, and joined her husband as a co-defendant merely for conformity, a joint counterclaim by husband and wife was allowed

Hodson v. Mochi, 8 Ch. D 569, 47 L. J. Ch 604

But if a plaintiff sues in his own right, the defendant cannot counterclaim against him as trustee or executor or administrator, if he sues as trustee or executor or administrator, the defendant cannot counterclaim against him in his own right, unless in either case there be special circumstances on the strength of which the defendant can obtain special leave under Order XVIII. r. 5.

Macdonald v. Carrington, 4 C. P. D 28, 48 L. J. C P. 179.

McEwan v Crombie, 25 Ch. D. p. 177.

Stumore v. Campbell & Co, (1892) 1 Q. B 314, 61 L. J. Q. B. 463.

The defendant can also plead a counterclaim against the plaintiff along with some other person, not already a party to the action (whom we will call a "third person"), provided it relates to or is connected with the subject-matter of the plaintiff's claim. (Jud Act, 1873, s. 24, sub-s (3); *S F Edge, Ltd v Wengel* (1907), 97 L. T. 447.) Or he can plead such a counterclaim against a co-defendant along with the plaintiff. But he cannot counterclaim against any co-defendant or third

*Particulars of Damage **

	<i>£</i>	<i>s</i>	<i>d.</i>
Value of 197 bags of (double) gum arabic, weighing, when sound, 380 cwt, at 25 <i>s</i> per cwt - - - -	475	0	0
Less price realized on sale of the same 197 bags as damaged	76	1	8
	<hr/>		
	£398	18	4

The plaintiffs claim 398*l* 18*s* 4*d*

[See Precedent No 93]

No 66

✓ NEGLIGENCE OF A SOLICITOR

1 The plaintiff is a married woman, the wife of A B, of ———, she sues in this action in respect of her separate estate.

2 The defendant is a solicitor of the Supreme Court, and was employed by the plaintiff in the year 1910 to advise her as to the investment of certain moneys, and in other business

3 The defendant as such solicitor, in the month of October, 1910, advised the plaintiff to invest the sum of 500*l* on a second mortgage of six leasehold houses situate in St Mark's Road, Dulwich The defendant recommended the said mortgage to the plaintiff as an excellent security for that amount

4 The plaintiff, relying on the advice and skill of the defendant, invested the said sum of 500*l* on the said mortgage, and the defendant acted as solicitor for the plaintiff in effecting this investment

5 No solicitor exercising ordinary care and skill would have advised a client to lend money on a security of such a nature as that on which the defendant advised the plaintiff to lend this money

6 The defendant was further guilty of negligence in not obtaining a report of a surveyor as to the condition and value of the said property before he advised the plaintiff to advance money thereon.

7 The defendant was also guilty of negligence as a solicitor in

* An order was subsequently made directing that the question of liability in this action should be tried first, the parties agreeing that the amount of damages, if any, should be afterwards assessed by an arbitrator to be agreed on

not ascertaining the condition, state of repair, and rental value of the said premises, and in representing to the plaintiff that the property was let at a net rental of 150*l* a year, whereas three of the six houses then were void, the other three were let to unsubstantial and unsatisfactory tenants at 20*l* a year each, and all six houses were very much out of repair

8 The plaintiff paid to the defendant the sum of 5*l* 15*s*. 6*d* as his charges in respect of the said investment

9 The first mortgagees have now taken possession of the property, which has proved insufficient to satisfy their claim, and the plaintiff has lost the whole of the said sum of 500*l* and the interest thereon from December 25th, 1910

The plaintiff claims.—

1 500*l*, and interest thereon at the rate of 5 per cent. per annum from December 25th, 1910, till judgment.

2 5*l* 15*s* 6*d* referred to in paragraph 8

No 67

✓ PERSONAL INJURIES IN A RAILWAY ACCIDENT

1. The plaintiff is a [*state his occupation*]

2 The defendants are carriers of passengers upon a railway from London to Glasgow for reward

3 On March 3rd, 1910, the plaintiff was received by the defendants as a passenger, to be by them safely and securely carried upon the said railway from London to Glasgow for such reward as aforesaid

4 Yet the defendants did not safely and securely carry the plaintiff from London to Glasgow, but so negligently and unskillfully conducted themselves in carrying the plaintiff on the journey aforesaid, and in managing the said railway and the carriage and train in which the plaintiff was then being carried by the defendants, that the said carriage and train came into violent collision with an engine at Carlisle Station, and the carriage in which the plaintiff was then being carried was wrecked and shattered.

5. The plaintiff was thereby thrown forward with violence, and was struck a violent blow on the left temple, and his legs were jammed between the *débris* of the said carriage, and were wounded and injured, and his spine and brain were injured, and his whole nervous system received a severe shock

6 The plaintiff has in consequence suffered great pain and is permanently injured, and has been put to great expense [or, incurred liability] for medical attendance, nursing and otherwise, and for hotel and lodging accommodation, and extra food and nourishment, and will be put to further like expenses in endeavouring to cure himself of his said injuries, and has been and is still prevented from pursuing his occupation, and has lost and will lose the salary which he otherwise would have earned

Particulars of Special Damage

	£	s	d
Medical attendance by Dr A - - - - -	16	5	0
Medical attendance by Dr B - - - - -	8	8	0
Hotel expenses at Carlisle - - - - -	3	4	8
Nurse (18 weeks) - - - - -	19	8	0
Expenses of visit to Hastings ordered by Dr A - - - - -	53	15	8
Extra food and nourishment - - - - -	10	0	0
Loss of salary (27 weeks) - - - - -	81	0	0
	<hr/>		
	£192	1	4

And the plaintiff claims ———/ damages

No 68

REPLEVIN

On March 31st, 1910, the defendant wrongfully seized the goods of the plaintiff [*enumerate them*] in his house (or field) [*describe the premises*] and took the same away and deprived the plaintiff of the use thereof, and unjustly detained the same from him whereby the plaintiff has suffered damage.

And the plaintiff claims ———/

No 69.

THREATS (*under 7 Edw VII c 29, s 36*)

1 The defendant claims to be the owner of letters patent for an invention of ———

2. The defendant, in furtherance of such claim, inserted in the issue of the "Daily Telegraph" for July 4th, 1910, an advertisement [*if not an advertisement, insert the particulars of the letter or other threat used*], by which he threatened the plaintiff with

person alone without the plaintiff; though he can claim contribution or indemnity from such persons under Order XVI rr 48 and 55 (*ante*, p 233).

Whenever such a counterclaim is pleaded, the defendant must place at the head of his Defence an additional title, stating the names of all persons whom he has thus made defendants to his counterclaim. (Order XXI r 11) If such persons are already parties to the action (*i e*, either plaintiffs or co-defendants), he merely *delivers* the pleading to them. But if he has joined a third person, a stranger to the action, as a defendant to his counterclaim, he must *serve* him with a copy of the Defence and Counterclaim as though it were a writ. The third person must appear to it as though he had been served with a writ (r 13), and he may plead to it without any leave from a Master (r 14). Any person thus made defendant to a counterclaim, whether plaintiff, co-defendant or third person, may before replying, apply to the Master to exclude the counterclaim, on the ground that it ought to be disposed of in an independent action, and not by way of counterclaim (r. 15). A plaintiff against whom a counterclaim is pleaded can in certain cases counterclaim against the defendant's counterclaim. (See *post*, p 260) He may also issue a third-party notice under Order XVI r 48, against a person not a party to the action from whom he claims contribution or indemnity (*Levi v Anglo-Continental, &c, Ltd*, (1902) 2 K. B. 481) But a third person brought in solely as defendant to a counterclaim cannot counterclaim against either the plaintiff or the defendant (*Street v Gover*, 2 Q. B. D. 498, *Alcoy, &c Ry. Co v. Greenhall*, (1896) 1 Ch. 19)

Illustrations.

A counterclaim is admissible against the plaintiff and a third person along with the plaintiff if its matter be connected with that of the plaintiff's claim, even though such third person could not possibly have been made a party in the plaintiff's original action.

Turner v. Hednesford Gas Co., 3 Ex. D. 145, 38 L. T. 8

And even, it seems, though the third person can only be liable in one of two inconsistent alternatives

Child v. Stenning, 5 Ch. D. 695, 46 L. J. Ch. 523, 25 W. R. 519; 36 L. T. 426.

But see *Evans v Buck*, 4 Ch. D 432, 46 L J. Ch. 157; 25 W. R. 392, and *Times Cold Storage Co. v Lowther*, (1911) 2 K. B. 100, 104 L T 637

A defendant cannot join a third person to be a joint plaintiff with himself in a counterclaim against the original plaintiff.

Pender v Tadden, (1898) 1 Q. B. 798, 67 L J Q B 703

To what extent is a Counterclaim an Independent Action

For many purposes a counterclaim is substantially a cross-action "A counterclaim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action." (Per Bowen, L J, in *Amon v. Bobbett*, 22 Q B. D. p. 548) If after the defendant has pleaded a counterclaim, the action of the plaintiff is for any reason stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with. (Order XXI r 16) Thus, where the plaintiff's claim was held to be frivolous, the Court still granted the defendant the relief prayed for by his counterclaim (*Adams v Adams*, 45 Ch D. 426, (1892) 1 Ch 369, *The Salybia*, (1910) P. 25) The Court will in a proper case order a counterclaiming defendant to give security for costs (*Sykes v Sacerdoti*, 15 Q B D 423, *Lake v. Haseltine*, 55 L J Q B 205), but not where the counterclaim is in substance a defence to the action (*Neck v Taylor*, (1893) 1 Q B 560; and see *New Fenix Compagnie v General Accident, &c Corporation*, (1911) 2 K B 611)

Yet a counterclaim differs in some respects from a cross-action The issues of fact raised by claim and counterclaim respectively must, as a rule, be tried together And only one judgment will be given on both claim and counterclaim (Order XXI r 17) That will be a judgment for the balance merely, so that for purposes of execution claim and counterclaim are not two independent actions. Then again, where the plaintiff for any reason fails to deliver a Defence to a counterclaim, the defendant cannot sign judgment on the counterclaim in default of pleading. he must move for judgment under Order XXVII r 11, or Order XXXII

r. 6. (*Higgins v. Scott*, 21 Q. B. D. 10; *Jones v. Macaulay*, (1891) 1 Q. B. 221; *Roberts v. Booth*, (1893) 1 Ch. 52.) A counterclaim, moreover, cannot be disposed of under Order XIV., or remitted to a County Court for trial (*Delobbel-Flipo v. Varty*, (1893) 1 Q. B. 663); though it may be stayed under sect. 4 of the Arbitration Act, 1889. (*Spartali v. Van Hoorn*, (1884) W. N. 32; *Chappell v. North*, (1891) 2 Q. B. 252.) If foreign plaintiffs bring an action here against a British subject who counterclaims, the Court has no jurisdiction to make an order staying proceedings in the action until the foreign plaintiffs give security for damages under the counterclaim. (*The James Westoll*, (1905) P. 47.)

And, although as a rule a counterclaim may be of any amount, overtopping the plaintiff's claim and entitling the defendant to judgment for the balance, still there are two exceptions to this rule, two cases in which a counterclaim, like a set-off, serves only as a defence, and is not a cross-action—or, to employ the time-honoured metaphor, can be used only “as a shield, not as a sword.” (*Per Cockburn, C. J.*, in *Stooke v. Taylor*, 5 Q. B. D. p. 575.)

(i) If a debt be assigned, the debtor may in certain cases set off or counterclaim against the assignee a debt due from the assignor to himself; but if the amount of such set-off or counterclaim exceed the amount of the debt assigned, the defendant can recover nothing from the assignee; he must sue the assignor for the balance. (*Young v. Kitchin*, 3 Ex. D. 127; approved in *Government of Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 199; *Roxburghe v. Cox*, 17 Ch. D. p. 526; and see *Baker v. Adam* (1910), 102 L. T. 248.)

(ii) A similar rule applies when a sovereign prince or state over whom our Courts have no jurisdiction (*Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is “outside of, and independent of, the subject-matter of” the claim. (*Strousberg v. Republic of Costa Rica*, 29 W. R. 125; 44 L. T. 199; *South African Republic v. La Compagnie, &c.*, (1897) 2 Ch. 487. (1898)

legal proceedings or liability in respect of the manufacture [use, sale, or purchase] of certain [mowing machines] which the plaintiff has for many years manufactured [or sold] without complaint from anyone [*set out what it is that the plaintiff is doing of which the defendant complains*]

3. The manufacture [use, sale, or purchase] by the plaintiff of the said [mowing machines] is no infringement of any letters patent owned by the defendant or of any legal right of his.

4 By reason of the said threats the plaintiff has been greatly damaged in his business and the manufacture [use, sale, or purchase] of the plaintiff's said [mowing machines] has been greatly diminished

The plaintiff claims —

- (1) An injunction to restrain the continuance of such threats.
- (ii) Damages

No 70

TRESPASS AND CONVERSION.

1. On the 26th December, 1910, the defendant broke and entered a close of the plaintiff's, known as The ——— Ironworks, Sheffield, and wrongfully removed and converted to his own use certain machinery of the plaintiff's, namely, a lathe and planing machine.

2 The defendant detains the said machinery and refuses to give up the same to the plaintiff

The plaintiff claims —

- (1) 50*l.* damages for the said trespass
- (2) A return of the said machinery or 300*l.*, its value, and 50*l.* damages for its detention

No 71

WASTE.

1. From Lady Day, 1904, to Lady Day, 1911, the defendant was tenant to the plaintiff of an old-established tavern, known as "The Goat and Compasses," on the Castle Hill in the City of Norwich

2. During such tenancy the defendant committed waste to the said premises by wrongfully taking down and removing the

- 1 Ch 190, *Imperial Japanese Government v P & O Navigation Co*, (1895) A C 644)

Costs of Set-off and Counterclaim

In the matter of costs, however, a counterclaim which is not a set-off is treated as a cross-action, whereas a set-off remains, what it was in the days of George II, a statutory defence to the plaintiff's action. Therefore a plaintiff who brings an action and is met by a set-off equal in amount to his claim, must pay the defendant his costs of the whole action, for he has failed in the whole action. Whereas if the defendant can plead only a counterclaim and recovers an amount equal to or greater than the plaintiff's claim, the plaintiff will recover his costs of the claim, and the defendant only his costs of the counterclaim. The proper principles on which in such a case taxation should be conducted, in the absence of any special order, are laid down by the Court of Appeal in *Atlas Metal Co v Miller*, (1898) 2 Q B. 500. The costs of the plaintiff's claim should first be taxed as if it were a separate action with no counterclaim. Then the costs incurred by the counterclaim must be taxed, as though they were part of the costs of a separate action. Any costs, which have been incurred partly in support of or in opposition to the defence, and partly in support of or in opposition to the counterclaim, the taxing-master must apportion as best he can, and fix the amount applicable to the defence and the amount applicable to the counterclaim. Then whichever be the smaller amount—the costs of the claim or the costs of the counterclaim—must be deducted from the larger, and the successful party will have judgment for the balance. “No costs not incurred by reason of the counterclaim can be costs of the counterclaim” (*Per Lindley, M R*, (1898) 2 Q. B at p 505). And remember that sect 116 of the County Courts Act, 1888, does not apply to any counterclaim (*Blake v Appleyard*, 3 Ex D. 195, *Amon v Bobbett*, 22 Q B D 543). Where both claim and counterclaim fail, the proper method of taxation of costs is that approved by Warrington, J, in *James v Jackson*, (1910) 2 Ch. at pp 93, 94, namely, to tax the costs of the defendant except so far as they have been increased by the counterclaim, and to tax the costs of the plaintiff only so far as they have been increased by the counterclaim, with a set-off of the one against the other.

CHAPTER XV

REPLY, &c

If no Defence be delivered, the plaintiff may enter final judgment under Order XXVII, if his claim be for a debt or liquidated damages, if it be for unliquidated damages or for detention of goods, he can enter interlocutory judgment only, and the amount for which final judgment will ultimately be entered must be assessed by an under sheriff and a jury on a writ of inquiry, or calculated by a Master, or ascertained by an official referee (See Order XXXVI rr. 56, 57, 57A; *Charles v Shepherd*, (1892) 2 Q B 622) In an action for the recovery of land, he may sign judgment for possession of the land with costs In all other cases he must move for judgment under Order XXVII r 11 On such a motion, the Court will decide the issues between the parties by looking at the Statement of Claim, and nothing else. No evidence is necessary. (*Macmillan v Australasian Territories*, 76 L T 182, *Webster v. Vincent*, 77 L T. 167) But the Court has discretion over the costs of the action, under Order LXV. (*Young v Thomas*, (1892) 2 Ch. 134.) The Court can, if need be, amend the Statement of Claim; if this is done, the amended Statement must be filed, and the motion renewed eight days after it is so filed (*Jamaica Ry Co. v Colonial Bank*, (1905) 1 Ch 677, *Southall Development Syndicate, Ltd v. Dunsdon* (1907), 96 L T 109)

If the defendant has paid a sum of money into Court, and the plaintiff is content to accept that sum in satisfaction of his claim, he should give the defendant a notice in Form

of R S C , Appendix B He may then proceed to tax his costs, unless the Court or a judge otherwise orders, and in case of non-payment he may sign judgment for his costs. (Order XXII. r. 7) This is so, even where the defendant pays sixpence into Court, and the plaintiff accepts that sum in satisfaction of his claim (*M'Sheffrey v. Lanagan*, 20 L R Ir 528) But a judge at chambers will deprive the plaintiff of his costs if the whole action was useless or malicious (*Broadhurst v Willey*, (1876) W. N 21, *Nichols v Evens*, 22 Ch D. 611) The acceptance by the plaintiff of a sum paid into Court does not operate as a judgment or amount to an admission on the merits (*Coote v Ford*, (1899) 2 Ch 93)

If a Defence be delivered, and it contains sufficient admissions, the plaintiff may move for judgment thereon under Order XXXII r 6, or for an order that the defendant pay into Court the money which he admits is in his hands (*Neville v Matthewman*, (1894) 3 Ch 345, *Nutter v Holland*, *ib.* 408; *Crompton v Burton*, (1895) 2 Ch 711) He may do this even though he has already delivered a Reply and given notice of trial (*Brown v Pearson*, 21 Ch D. 716), but in that case the defendant should be indemnified against any costs incurred by him through the plaintiff's delay (*Tottenham v Foley*, (1909) 2 Ir R 500).

Leave to Reply

Except in Admiralty actions, no Reply can now be delivered, unless an order has been made giving the plaintiff leave to deliver it The Master when he makes such order generally names a time within which the Reply must be delivered, if no time be specified the plaintiff must deliver it within ten days after the Defence or the last of the Defences has been delivered, unless the time be extended by consent or by order. (Order XXIII rr 1, 2) If the plaintiff's only object in delivering a Reply is to deny what the defendant has stated

in his Defence, the Master will not give leave, because if no Reply be delivered within the time prescribed, all material statements of fact in the Defence will "be deemed to have been denied and put in issue" (Order XXVII r. 13), and then the plaintiff can give notice of trial at once (See *post*, p 262) But if a Counterclaim has been delivered with the Defence, the Master will generally give leave for a further pleading, as the plaintiff must deal specifically with every allegation of fact in the Counterclaim which he does not admit to be true (Order XIX r 17) Different rules, in short, apply to what may be termed a "Reply proper" and a "Defence to Counterclaim "

Joinder of Issue

Where however, leave has been obtained to deliver a Reply, Order XIX. r. 18 still applies: "The plaintiff by his Reply may join issue upon the Defence [though not on the Counterclaim, if any] . Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted "

A joinder of issue runs simply thus "The plaintiff joins issue with the defendant on his Defence " Some pleaders add, "except in so far as the same consists of admissions," but this qualification is unnecessary, as an admission by the defendant of a fact alleged in the Statement of Claim is not a "material allegation of fact in the pleading upon which issue is joined." To a plea of payment into Court, it is usual to reply specially that the sum paid in is insufficient

But the effect of joining issue is merely to *deny* ; it does not confess and avoid. It is simply a comprehensive and com-

ancient signboard belonging to the said premises, which for very many years was fixed over the front door thereof. The defendant wrongfully carried the same away and converted it to his own use, and detained, and still detains, the same from the plaintiff.

And the plaintiff claims —

- (i) That the defendant may be ordered to at once restore the said signboard, and refix the same in its former position, or
- (ii) In the alternative, the return of the said signboard or ————l its value, and damages for its removal and detention

(iii) IN ACTIONS FOR THE RECOVERY OF LAND

No. 72

✓ EJECTMENT OF A TENANT

1 By an agreement in writing, dated September 22nd, 1909, the plaintiff let to the defendant a house, No. 52, Broad Street, Bristol, for the term of three years from September 29th, 1909, at the yearly rent of 120*l*, payable quarterly.

2 By the said agreement, the defendant promised to pay the said rent in equal quarterly instalments on the usual quarter days. The said agreement also contained a clause entitling the plaintiff to re-enter in case the said rent, whether lawfully demanded or not, was more than twenty-one days in arrear.

3 The defendant took possession of the said house under the said agreement, and is still in possession thereof. He paid the plaintiff rent up to Lady Day, 1910; he has paid no rent which has accrued since that day.

And the plaintiff claims —

- (i) Possession of the said house;
- (ii) 150*l*., being five quarters' arrears of rent,
- (iii) Mesne profits from June 24th, 1911, till possession of the said house is delivered to the plaintiff.

[N B.—As this is a claim for ejectment on a forfeiture for non-payment of rent, it can be indorsed on the writ. Order III. r. 6 (F), see *ante*, pp. 42, 45, and Order XIV. r. 10, *ante*, p. 59.]

For other precedents in actions of ejectment between landlord and tenant, see Nos. 37, 38, and 39, *ante*, pp. 405, 406

pendious *traverse* "The new form merely enables a party to traverse what he might have traversed before the Act, but does not do away with the necessity of pleading in confession and avoidance" (*Per Parke, B*, in *Glover v. Dixon*, 9 Ex. at p 160.) "The plaintiff must raise by his pleading all such grounds of reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law or Statute of Frauds" (Order XIX r 15.) "The Reply is the proper place for meeting the Defence by confession and avoidance." (*Per James, L J*, in *Hall v. Eve*, 4 Ch. D at p. 345)

The plaintiff must therefore be careful not to join issue merely, where he ought to allege new facts in his Reply, for a joinder of issue only contradicts the facts alleged by the defendant

Illustrations

Action of trespass Defence, that it was defendant's own freehold Reply, a mere joinder of issue. At the trial, the plaintiff was not allowed on these pleadings to give evidence of a lease from defendant's ancestor to himself, as that was a new fact consistent with the plea traversed, and should therefore have been specially pleaded by way of confession and avoidance

5 Hen. VII 10a pl 2, and see *ante*, p 129.

To a plea of the Statute of Limitations, plaintiff must specially reply any fact upon which he relies to take the case out of the statute; *e.g.*, that the plaintiff himself was and still is an infant.

Chandler v Vilett, 2 Wms Saunders, 120; ed. 1871, p. 391.

Or the absence of the defendant beyond seas

4 & 5 Anne, c 16, s 19

Or any acknowledgment, see p 145

. *Forsyth v. Bristowe*, 8 Ex. 347, 22 L. J. Ex. 70.

Skeet v Lindsay, 2 Ex. D. 314, 46 L J Ex 249, 25 W. R. 322;
36 L T 98

To a declaration for non-payment of money due under a covenant, the defendant pleaded that the cause of action did not accrue within twenty years. Replication that it did accrue within twenty years. *Held*, under stat 3 & 4 Will. IV c 42, ss 3, 5, that the plaintiff could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years.

Kempe v. Gibbon, 9 Q. B. 609, 16 L. J. Q. B. 120

Action for money had and received to the use of the plaintiff. Plea of the Statute of Limitations. Reply, that the defendant had received the money to the use of the plaintiff within six years. It was proved at the trial that the defendant had fraudulently received the money more than six years ago. *Held*, that the plaintiff could not on this issue give any evidence to show that the defendant had, till within six years before action, fraudulently concealed the fact that he had received the money.

Clark v. Hougham, 2 B. & C. 149, 3 D. & R. 322

Such a ground of reply must be specially pleaded, and with great particularity.

Gibbs v. Guild, 8 Q. B. D. 296, 9 Q. B. D. 59

Lawrance v. Lord Norreys, 15 App. Cas. 210, 59 L. J. Ch. 681

Willis v. Earl Howe, (1893) 2 Ch. 545, 62 L. J. Ch. 690

Betjemann v. Betjemann, (1895) 2 Ch. 474, 64 L. J. Ch. 641.

And the fraud alleged must be the fraud of the person setting up the statute or of some one through whom he claims.

In re McCallum, (1901) 1 Ch. 143, 70 L. J. Ch. 206

If the defendant obtained from the plaintiff a release of his cause of action, either fraudulently or by duress, the fraud or duress must be specially pleaded in reply to the plea of release.

To a plea of infancy, the plaintiff must reply specially that the goods sold and delivered "were necessities suitable to the then degree, estate, and condition of the defendant."

Peters v. Fleming, 6 M. & W. 42.

To a justification setting out a conviction, or to a plea of a previous action, the plaintiff must reply specially that there is no such record, if it be the fact, or if the conviction be erroneously stated in the Defence (as in *Alexander v. N. E. Rail. Co.*, 6 B. & S. 340, 34 L. J. Q. B. 152), the plaintiff may set it out correctly in his Reply. Or to such a justification the plaintiff may reply a pardon (*Cuddington v. Wilkins*, Hob. 67, 81; 2 Hawk. P. C. c. 37, s. 48, *Rawley's Case*, Hutton, 21), or that he had undergone his sentence, which will have the same effect.

Leyman v. Latimer, 3 Ex. D. 15, 352, 47 L. J. Ex. 470, 26 W. R. 305, 37 L. T. 360, 819, 14 Cox, C. C. 51

To a plea of a settled account, the plaintiff must specially reply the

facts on which he relies to re-open the account: *e.g.*, he must specify the errors in the account on which he relies (*ante*, p 231)

Parkinson v Hanbury, L. R. 2 H. L. 1, 36 L. J. Ch. 292, 15 W. R. 642, 16 L. T. 243.

To a plea of the Statute of Frauds, the plaintiff may plead specially a part performance, where such a reply is applicable

Ungley v Ungley, 5 Ch. D. 887, 46 L. J. Ch. 854, 25 W. R. 733, 37 L. T. 52

Maddison v Alderson, 8 App. Cas. 467, 52 L. J. Q. B. 737, 31 W. R. 820, 49 L. T. 303; 47 J. P. 821.

But a plaintiff cannot plead the Statute of Frauds to a contract pleaded by the defendant, unless the defendant claims a set-off, or counterclaims, under that contract

Miles v. New Zealand Alford Estate Co., 32 Ch. D. at pp. 278, 279.

To a set-off or counterclaim, he can, and therefore must, he cannot raise the point under a mere joinder of issue.

Chapple v. Durston, 1 Cr. & J. 1

Action for specific performance of an agreement to grant a lease. Defence, breaches of contract, which entitled the defendant to put an end to the agreement, and to refuse to grant any lease. The plaintiff, in his Reply, denied all such breaches, but pleaded also that if any were committed, they were waived, and this Reply was held good. A plaintiff may confess and avoid by his Reply: for it is no part of the Statement of Claim to anticipate the Defence, and the old rule of pleading still holds, "that you should not leap before you come to the stile" (See *ante*, p. 96)

Hall v. Eve, 4 Ch. D. 341, 347, 46 L. J. Ch. 145, 25 W. R. 177, 35 L. T. 926

A Reply must not refer to an independent document, such as plaintiff's answer to interrogatories, as containing facts on which the pleader relies, without setting out such document itself as part of the Reply. A Reply must not set up new claims. A Reply must not plead mere evidence or argument, or state conclusions of law to be drawn or inferred from the facts pleaded

Williamson v L & N. W. Rail Co., 12 Ch. D. 787, 49 L. J. Ch. 559, 27 W. R. 724

Departure

It is at the stage of Reply that the rule against what is called "a departure in pleading" applies for the first time. "No pleading shall, except by way of amendment, raise any

No 73

EJECTMENT BY A REMAINDERMAN

1 The plaintiff is the heir-at-law of one Mary Llewellyn, who died on January 18th, 1803, and as such is entitled to the possession of the lands, hereditaments, messuages, and promises which are fully described in the particulars delivered herewith, and which are hereinafter called "the said lands "

2 On February 10th, 1765, the said Mary Llewellyn, then Mary Talbot, was seised in fee and was in possession of the said lands

3 On that day she married Henry Llewellyn, and they jointly levied a fine of the said lands to certain uses, under which the said Henry Llewellyn in the events which happened became tenant in fee simple of the said lands

4 By the will of the said Henry Llewellyn, who died on February 27th, 1785, the said Mary Llewellyn became entitled to the said lands in fee simple in remainder expectant on the determination of certain estates tail limited in the said will

5 The last of the said estates tail determined on June 12th, 1894 And thereupon the plaintiff's interest in the said lands as heir-at-law of the said Mary Llewellyn became an estate in fee simple in possession

6 The plaintiff has been in possession of part of the said lands, but in the month of May, 1896, he was wrongfully and forcibly ousted therefrom by the defendants.

7 The defendants wrongfully took and now hold possession of the whole of the said lands.

The plaintiff claims:—

- (i) Possession of the said lands;
- (ii) Mesne profits from June 12th, 1894, till possession is obtained by the plaintiff

[See *Darbyshire v Leigh*, (1896) 1 Q B. 554]

✓ (iv) IN AN ACTION CLAIMING ONLY A DECLARATION

No 74

LANDLORD v MORTGAGEE OF TENANT

1 The plaintiffs are the executors and trustees of the will of James Harris, deceased, formerly of ———

2 By a lease, dated September 12th, 1902, the said James Harris demised to one Richard King a building, then and now used as a place of public entertainment, called the ——— Music Hall, situate in ———, with certain appurtenances, fixtures, chattels and effects (hereinafter called "the said premises") for a term of twenty-one years from September 15th, 1902, at the yearly rental of 450*l*, payable by equal weekly instalments, and subject to the several covenants, stipulations, and conditions contained in the said lease

3. By a mortgage deed, dated October 15th, 1902, the said Richard King demised the said premises to the defendants for the residue of the said term of twenty-one years, except the last three days thereof, to secure a loan of 1,000*l* and interest thereon

4 On May 31st, 1904, the defendants entered into possession of the said premises, and under a power reserved to them in the said mortgage deed have from that day till now occupied the said premises and carried on the business of the said Richard King thereon, and received the profits thereof

5. In June, 1904, the said Richard King was adjudicated bankrupt in the County Court of Yorkshire, holden at Bradford, and in September, 1904, the duly appointed trustee of his property under the said bankruptcy, by leave of the Court, disclaimed the said lease, and gave notice of such disclaimer to the said James Harris.

6 By an indenture, dated July 30th, 1904, made between the said James Harris and the defendants, and indorsed upon the said lease, after reciting the said mortgage deed, and that the defendants, as such mortgagees as aforesaid, had applied to the said James Harris to allow them to continue to occupy the said premises and to vary the terms of the said lease in certain respects as thereafter mentioned, which he had agreed to do, it was witnessed that—

[Here set out the terms of the arrangement.]

new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." (Order XIX. r. 16)

A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and a different ground, or, to give Lord Coke's definition, " A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and therefore it is called *decessus*, because he departeth from his former plea " (Co. Litt 304a) This is clearly embarrassing, a Reply is not the proper place in which to raise new claims, to permit this would tend to spin out the pleadings to an intolerable length. The plaintiff must amend his Statement of Claim by adding the new matter, if need be, in the alternative

Illustrations

If the Statement of Claim alleges merely a negligent breach of trust, the Reply must not assert that such breach of trust was fraudulent

Kingston v. Corher, 29 L R 11. 364

In an action of debt brought on a bond conditioned to perform an award so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators did not make any award. The plaintiff replied that the arbitrators did make an award to such an effect, and that the same was tendered by the proper time. The defendant rejoined that the award was not so tendered. On demurrer, it was held that the Rejoinder was a departure from the plea. "for in the plea the defendant says that the arbitrators made no award, and now, in his Rejoinder, he has implicitly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition, which is a plain departure, for it is one thing not to make an award, and another thing not to tender it when made "

Roberts v. Marrett, 2 Wms Saunds. 188.

Claim for one-half of 500*l.*, which the defendant had received as trustee for himself and the plaintiff in equal shares.

Defence I only received 311*l.*, half of which I pay into Court

Reply You ought to have received the full 500*l.*, but you wrongfully compromised with the debtor , so I still claim one-half of 500*l.*

Held, that this Reply violated Order XIX r 16, as it was really setting up a new case, which should have been set out in the Statement of Claim

Earp v Henderson, 3 Ch D 254; 45 L J Ch. 738, 34 L T 844.

If this case was intended to decide anything more than this, it is to that extent overruled by

Hall v Eve, 4 Ch. D. 341, *ante*, p 255

Action for the recovery of land, with a claim for mesne profits

Defence "The following letters passed between the defendant and the plaintiff's late father, who was seised in fee of the land, which amount to a binding agreement for a lease" The plaintiff cannot turn round and say in his Reply "Oh! very well, then pay me the rent mentioned in those letters" For by his Statement of Claim he treats the defendant as a trespasser, he must abandon that position before he can claim rent from him as his tenant

For the same reason, if a plaintiff claims rent on his writ, he cannot claim the same sum in his Reply as damages for unlawfully "holding over"

Duckworth v. McClelland, 2 L R Ir 527

A died in 1833, having devised Blackacre to his younger son, Z, without any words of limitation On the death of Z, childless and intestate, his elder brother, Y, sued to recover Blackacre from Z's stepson, who had got into possession of it. The Statement of Claim alleged that Z had only an estate for life in Blackacre, the reversion on which was always vested in Y, as heir of the testator

Defence That on the true construction of the will, although it was made before the Wills Act, Z took the fee simple.

Reply Be it so, Y is equally heir-at-law of his younger brother, Z, and so entitled to recover

The Master at Chambers held that this Reply was inconsistent with the original claim, that the Statement of Claim must be amended by setting out the precise words of the devise, which had now become maternal, and that the plaintiff must claim in the alternative (1) as heir of A, if Z were but tenant for life, (2) as heir of Z, if he were tenant in fee. Costs in cause

Baker v Farmer (not reported)

Action on a bond conditioned to perform the covenants in an indenture of lease, one of which was, that the lessee at every felling of wood would make a fence. The defendant pleaded that he had not felled any wood. The plaintiff replied that the defendant had felled two acres of wood, but had made no fence The defendant rejoined that when he felled those

two acres, he did make a fence. This was adjudged a departure in the Rejoinder. In modern days, this difficulty would not have arisen, as the plaintiff would have been compelled to give particulars in or under his Statement of Claim, stating precisely when he alleged the defendant had felled any and what wood.

Anon., 3 Dyer, 253 b.

So, in another action on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, &c., of one Thomas Cook, the defendants pleaded that they had kept the plaintiffs harmless, &c. The plaintiffs replied that Cook sued them, and so the defendants had not kept them harmless, &c. The defendants rejoined that they had not any notice of the damnification. And the Court held first, that the matter of the Rejoinder was bad, as the plaintiffs were not bound to give notice; and secondly, that the Rejoinder was a departure from the plea; for, in the plea, the defendants plead, that "they have saved harmless the plaintiffs, and in the Rejoinder confess that they have not saved harmless, but allege they had not notice of the damnification; which is a plain departure."

Cutler v. Southern, 1 Wms. Saund. 116.

In an action of trespass, the defendant set up that he was entitled to the premises under a lease for 50 years granted to him by the college of R. The plaintiff replied that there was another prior lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for 50 years; and alleged a proviso in the Act of 31 Hen. VIII. c. 13, avoiding all leases by the colleges to which that Act relates made under such circumstances. The defendant in his Rejoinder, pleaded another proviso in the statute, which allowed such leases to be good for 21 years if made to the same person, &c., and that by virtue thereof, the demise stated in his plea was available for 21 years at least. The judges held the Rejoinder to be a departure from the plea; "for in the bar he pleads a lease of 50 years, and in the Rejoinder he concludes upon a lease for 21 years," &c. And they observed that "the defendant might have shown the statute and the whole matter at first."

Fulmerston v. Steward, Plowd. 102.

But in an action of trespass on the case for illegally taking toll, the plaintiff in his declaration set forth a charter of 26 Hen. VI., discharging him from toll. The defendant pleaded a statute resuming the liberties granted by Hen. VI. The plaintiff replied that by the statute 4 Hen. VII. such liberties were revived; and this was held to be no departure. For the Reply re-established and fortified the claim.

Wood v. Hawkshead, Yelv. 13.

Sq in an action of debt on a bond conditioned to perform covenants, one of which was, that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied, that the defendant had received 26*l*, for which he had not accounted. The defendant rejoined that he had accounted for that 26*l* *modo sequente*, viz, that certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff. And it was objected that the Rejoinder was a departure, for the Rejoinder did not show an accounting, but an excuse for not accounting. But the Court held that showing he was robbed of a sum of money, was giving an account of it, and that therefore there was no departure.

Vere v. Smith, 2 Lev 5, Ventr 121

Yet a plaintiff might always "new assign" in his Reply, in other words, though he might not set up a new claim, he might explain and define his original claim, a thing which it was often necessary to do in the days when declarations were worded in very general terms. Thus, in an action for repeated trespasses to a close of land, if the defendant pleaded that he had a right of way across that close, the plaintiff might reply that his action was brought, not in respect of the defendant's exercise of the right of way, but because he constantly wandered out of the line of way on to other parts of the close. Such a reply would not be a departure, for it merely points out the exact nature and extent of the plaintiff's original claim.

Pratt v Groome, 15 East, 235

Oakley v Davis, 16 East, 82

And see *Bieslauer v Barwick*, 24 W. R. 901, 36 L. T. 52.

Collett v. Dickinson, 26 W R 403

Defence to Counterclaim.

Where a Counterclaim is pleaded, the Reply to it is really a Defence. The plaintiff cannot join issue on a Counterclaim. "It shall not be sufficient for a plaintiff in his Reply to deny generally the facts alleged by the defendant in his Counterclaim; he must deal specifically with each allegation of fact of which he does not admit the truth, except damages." (Order XIX. r. 17. See also r. 15) He must plead to it as though it were a Statement of Claim. He may pay money into Court in satisfaction of a Counterclaim, subject to the like conditions as to costs and otherwise as upon payment into

Court by a defendant. (Order XXII. r. 9; *Hutchinson v. Barker*, 71 L. T. 625.) He may even counterclaim to it, if any cross-claim has accrued to him either before or after action brought, which arose at the same time and out of the same transaction as the Counterclaim (*Toke v. Andrews*, 8 Q. B. D. 428), provided the plaintiff desires to use such cross-claim merely as a shield against the defendant's Counterclaim; otherwise he must amend his Statement of Claim. (*Renton Gibbs & Co., Ltd. v. Neville & Co.*, (1900) 2 Q. B. 181.) "If, after a Defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be raised by the plaintiff in his Reply, either alone or together with any other ground of reply." (Order XXIV. r. 1.) "Where any ground of defence to any set-off or counterclaim arises after Reply, or after the time limited for delivering a Reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, or at any subsequent time, by leave of the Court or a judge, deliver a further Reply setting forth the same." (Order XXIV. r. 2.)

Rejoinder, &c.

The defendant's answer, if any, to a Reply is called a Rejoinder; but it is now seldom pleaded. (See, however, Precedent, No. 112.) Further pleadings are possible; there can be a Surrejoinder, a Rebutter, and a Surrebutter; but they are very seldom met with now.

None of these pleadings can now be delivered without an order, unless it is a mere joinder of issue. (Order XXIII. r. 3.) And it is unnecessary now to deliver a mere joinder of issue; because delivering nothing will have the same effect; all material statements of fact in the Reply will be deemed to have been denied. (Order XXVII. r. 13.) Issue should never be joined on a joinder of issue. The principle of rule 15 of

Order XIX. applies to all these subsequent pleadings. Hence, if the defendant desires to give evidence at the trial of any fresh facts by way of confession and avoidance, in answer to the plaintiff's Reply, he must allege them specially in his Rejoinder, and not merely join issue. He must satisfy the Master that such a pleading is necessary, and obtain his leave to deliver it. The Master will only give leave upon such terms as he shall think fit. Every pleading subsequent to Reply must be delivered within the time named in the order giving leave to deliver it, or if no time be specified in the order, then within four days after the delivery of the previous pleading, unless the time be extended by order or consent.

As soon as any party has simply joined issue upon the preceding pleading of the opposite party or—what will have the same effect—has delivered no pleading in reply to it within the time prescribed, the pleadings as between such parties will be deemed to be closed (Order XXVII r 13); the issues are clear, and the case is ready for trial.

Discontinuance

But the parties do not always desire to proceed to trial. An action is often compromised, sometimes it goes to sleep without any definite compromise being arranged. Or it may be that the plaintiff is now satisfied that he cannot succeed. If so, he may at any time consent to judgment against himself, and from that two results will follow (a) he must pay the defendant his costs, (b) he can never take any subsequent proceeding against the defendant or any one claiming through or under him for the same cause of action.

It may sometimes, however, be the case that, though a plaintiff is compelled—through lack of some necessary piece of evidence, or for some other adequate reason—to abandon his present proceedings, he may yet desire to preserve his right to bring a fresh action under more favourable circum-

stances At common law, before the Judicature Act, a plaintiff was allowed to discontinue his action at any time before judgment, or to withdraw the record before the jury were sworn, or to elect to be non-suited, and was yet at liberty to re-enter the cause, or bring a second action But now this liberty has been greatly curtailed; there is no longer such a thing as a non-suit. (*Fox v The Star Newspaper Co, Ltd*, (1900) A. C. 19.) The plaintiff may now discontinue the action, or withdraw any part of it, by giving notice in writing to the defendant If he does so before the Defence is delivered, or even after its delivery before taking any other proceeding in the action (save any interlocutory application), he may discontinue without leave and yet can bring a second action, he must, however, pay the costs of the first action, or the second action will be stayed. At any later stage of the action he can only discontinue by leave, and the Master can, and generally will, make it a condition of giving such leave that no further proceedings shall be taken in the matter. (Order XXVI rr. 1, 4) The fact that the defendant is anxious to interrogate the plaintiff is no ground for refusing the plaintiff leave to discontinue. (*Hess v Labouchere*, 14 Times L R. 350)

Notice of Trial

But if the plaintiff desires to proceed with his action, his next step is to deliver a notice of trial, naming the place and the day which he proposes for the trial of the action. He must give at least ten days' notice of trial, unless the defendant has consented, or has been ordered, to accept short notice of trial, which is usually four days. The plaintiff may give notice of trial with his Reply, if any, whether it closes the pleadings or not, or if no leave has been given to deliver a Reply, on the expiration of four days after the Defence, or the last of the Defences shall have been delivered (Order XXXVI r. 11.) If the plaintiff does not give notice of trial within six

weeks after the close of the pleadings, the defendant may either give notice of trial himself, or apply to a Master to dismiss the action for want of prosecution (r. 12). Whichever party gives notice of trial should, if the action be for trial in London or Middlesex, enter it for trial on the day of, or the day after, giving notice of trial, if he omits to do so, the other party may enter it during the next four days, if neither party enters the action for trial within six days after notice of trial is given, such notice will be no longer in force (Order XXXVI. rr 16, 20) If, however, the action be for trial at the Assizes, it must be entered either in the Assize town at the District Registry (if there be one there) or with the associate of the circuit; and such entry must be made not less than seven days before the commission day, except by special leave. (Order XXXVI. r. 22B.) By special leave, however, notice of trial may be given for the second or any later day of an Assize. (*Baxter v. Holdsworth*, (1899) 1 Q B 266.)

CHAPTER XVI

DISCOVERY OF DOCUMENTS

THE issues in the action being now clearly stated in the pleadings, each party naturally begins to ask himself how he shall prove his case. What evidence is available? Some letters have, as a rule, passed between the parties before the action was commenced, and these may contain important admissions, or be evidence of some material fact; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's, and neither set is properly intelligible without the other. It is most desirable that any one who intends to give evidence should, if possible, read over his own letters before he enters the witness-box. For his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his account of it, given in a letter, which remains in black and white, as clear and intelligible now as it ever was. Moreover, there is no better material for cross-examining an opponent than his letters written before the dispute arose. Hence it is generally desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones. Such disclosure is obtained by the process—formerly only available in Equity, but now freely used in all Divisions of the High Court—called “Discovery of Documents.”

There are three distinct cases to be dealt with.—

(1) It may be that one party has, in his pleading, particular, or affidavit* referred to some document, and he cannot

* This is so, even though the affidavit has not yet been filed (*Fenner v. Lord*, (1897) 1 Q. B. 667)

say, that it is not material, as he relies on it himself. His opponent is, in such a case, entitled, without filing any affidavit or making any payment into Court, at once to give notice under Order XXXI r 15, that he will call and see that document, and take a copy of it, if he deems it sufficiently material. And the party who has referred to the document must produce it for inspection, if he has it in his possession at the time named in the notice, if he does not, he cannot himself put it in evidence at the trial, unless he can satisfy the judge that he had some sufficient reason for not producing it, or if the other party requires inspection of the document for the purposes of his own case, he may apply to the Master for an order for inspection under rule 18, but such order will only be made if the Master deems it necessary either for disposing fairly of the cause or matter or for saving costs. And see rr 16, 17.

(11) In the second place, it may be that one party knows, or thinks he knows, that the other has certain material documents in his possession, though they are not referred to in any pleading, particular, or affidavit. In such a case he may file an affidavit stating his belief, and the grounds of his belief, specifying the particular documents, and showing that they are material. (*White v Spafford*, (1901) 2 K B. 241, *Huntley Brothers v Owners of Backworth Colliery*, (1911) W N 34) Upon this the Master can order his opponent to state on affidavit whether he has or ever had any of those documents in his possession or power, and, if he ever had one of them and has not now, when he parted with it, and what has become of it (Order XXXI r 19a (3).) If in this affidavit he admits that he has any of the documents specified, and that it is material, it becomes at once a document referred to in an affidavit within the preceding paragraph, and r 15 of Order XXXI. applies to it.

(iii.) But in most cases neither party has any clear idea as

to the documents in his opponent's possession. He may be able to guess at some of them, but he would like a detailed list of them all; and thus he can generally obtain by paying for it. Any party may, without filing any affidavit, or naming any particular document, apply to a Master on a summons for directions under Order XXXI r 12, for an order directing any opponent in the action to disclose on oath all documents which are, or have been, in his possession or power, relating to any matter in question in the action.* A plaintiff can obtain such disclosure from any necessary defendant (*Spokes v Grosvenor Hotel Company*, (1897) 2 Q B 124.) And one defendant can obtain it from his co-defendant if there be some right to be adjusted between them in the action (*Shaw v Smith*, 18 Q B D 193, *Alcoy and Gandia Ry. Co v Greenhall*, 74 L T 345, *James Nelson & Sons, Ltd v. Nelson Line, Ltd*, (1906) 2 K B 217.) Whichever party makes the application may be ordered to pay into Court to the "Security for Costs Account," a sum of money fixed by the Master, but such an order is now seldom made (Order XXXI. r 26.)

On the hearing of the application, the Master will order such discovery only when, and only so far as, he deems it necessary either for disposing fairly of the action or for saving costs. If he is satisfied that discovery is not necessary, he will refuse the application. (See r. 20.) In either case he will order either general discovery, or, if he thinks fit, discovery limited to certain classes of documents, thus, if particulars have been delivered, discovery will be limited to the issues as narrowed by the particulars. The party seeking discovery must serve on his opponent the Master's order, together with a copy of the receipt for any money paid into Court.*

* The usual form of order will be found *post*, p. 409

7 The said James Harris died on June 21st, 1905 By his last will, dated October 3rd, 1904, he devised the said premises to the plaintiffs, subject to the said lease

8 The defendants have regularly paid to the plaintiffs the rent reserved by the said lease But they deny that they are liable to perform or observe any of the covenants of the said Richard King contained in the said lease They deny that they are or ever have been in possession of the said premises as tenants thereof either to the said James Harris, or to the plaintiffs Or, if tenants at all, they assert that they are only weekly tenants of the said premises

And the plaintiffs, as such executors and trustees as aforesaid, claim —

- (1) A declaration that the defendants are tenants to the plaintiffs of the said premises for the residue of the said term of twenty-one years, and upon all the other terms of the said lease,
- (ii) Or, in the alternative, a declaration that the defendants are liable to perform and observe the covenants of the said Richard King contained in the said lease (a) till the expiration of the said term of twenty-one years, or (b) so long as the defendants continue in occupation of the said premises

IV — DEFENCES.

(1) IN ACTIONS FOR BREACH OF CONTRACT

No 75

ACTION ON AN AWARD

1 The said arbitration was not properly or fairly conducted. No opportunity was given to the defendant to produce any evidence before the said arbitrator, and the said arbitrator did not himself view any of the goods injured by the said fire; wherefore the said award is not legally valid or binding on the defendant.

2 The plaintiff had notice of all the facts alleged in the preceding paragraph before he issued the writ in this action

No 76

BREACH OF PROMISE OF MARRIAGE.

(Defence to No 19)

1. The defendant never promised to marry the plaintiff

2. The defendant never seduced the plaintiff

3 The plaintiff never permitted the defendant to seduce her, relying upon any promise of his, or at all

4 Before the alleged breach, to wit, on September 1th, 1911, the contract, if any, between the plaintiff and defendant was rescinded by mutual consent; and the plaintiff wholly exonerated and discharged the defendant from the performance of his alleged promise

No 77

COMMISSION

1. The plaintiff did not do any of the work alleged in the Statement of Claim or earn any of the commission therein claimed.

2. The plaintiff has not effected a sale of, or found a purchaser for, any of the ground rents in the Statement of Claim mentioned.

Affidavit of Documents

Any party who has been ordered to make general discovery must make an affidavit, specifying all the documents material to the matters in dispute in the action, which are, or have been in his possession. He must describe them with particularity sufficient to identify them hereafter, should the Court think fit to order any of them to be produced (*Taylor v. Batten*, 4 Q B D 85) He must also specify which, if any, he objects to produce (Order XXXI. r 13), and on what grounds he so objects. He must specify all material documents, whether he objects to produce them or not, but immaterial documents he should altogether omit. Any document which he sets out he thereby admits to be material. Hence he should make no reference in his affidavit to any document which he honestly believes to be irrelevant to the action. Every document which will throw any light on any part of the case is material, and must be disclosed. If some portion of a document or book is relevant and the rest not, he must specify which portions he admits to be relevant, he has the document or book in his possession, and he must therefore take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question (*Yorkshire Provident Co. v Gilbert*, (1895) 2 Q. B 148, 153.) But discovery, and inspection, too, are strictly limited to the matters in issue in the action.

Illustrations

Thus, if either party has delivered particulars he will only be entitled to discovery of such documents as are relevant to the matters specified in such particulars.

Arnold and Butler v. Bottomley, (1908) 2 K B. 151, 77 L J K. B. 584, 98 L. T 777

The proprietor of a newspaper sued for a libel which has appeared in

his columns need not, as a rule, disclose the manuscript from which he printed the libel

Hope v Brush, (1897) 2 Q. B. 188, 66 L. J. Q. B. 653, 45 W. R. 659; 76 L. T. 823

Kelly v Colhoun, (1899) 2 Ir. R. 199

An Affidavit of Documents is generally in the form shown in Precedent, No. 113. It has two schedules, and the first schedule has two parts. In Schedule I, Part 1, the deponent sets out the documents which he has in his possession and is willing to produce; in Part 2, the documents which he has in his possession and refuses to produce. In Schedule II he sets out documents which he once had in his possession, but has not now. The reasons for which he refuses production he states in the body of the affidavit.

Claim of Privilege

The fact that a document was written on a privileged occasion, in the special sense in which that term is used in actions of defamation, is no reason for refusing to produce it; it is not on that ground privileged from inspection. (*Webb v. East*, 5 Ex. D. 23, 108.) But there are seven grounds on which production may be lawfully refused —

1. Documents of Title.—No party need produce any document which he can swear to relate solely to his own title to any real property, corporeal or incorporeal, and to contain nothing which tends to establish the title of his opponent. (*Egremont Burial Board v. Egremont Iron Ore Co*, 14 Ch. D. 158, *Morris v Edwards*, 15 App. Cas. 309.) If, however, the documents are material to his opponent's title, the deponent must disclose them, even though he be a purchaser for value without notice. (*Ind, Coope & Co v Emmerson*, 12 App. Cas. 300.)

2. Deponent's own Case.—Any document is also privileged from production which the deponent can swear to relate

solely to his own case, and to contain nothing to assist his opponent's case or to impeach his own (*Bewicke v Graham*, 7 Q B D 400, *Budden v Wilkinson*, (1893) 2 Q B 432, *Frankenstein v Gavin*, (1897) 2 Q B 62, *Att-Gen v. Newcastle-upon-Tyne*, (1899) 2 Q B 478, *Johnson v. Whitaker*, 90 L T 535)

3 *Communications between Solicitor and Client*—Any document which a man at any time prepared in order that his solicitor might advise him on the facts stated therein, or that it might be submitted to counsel for his advice, is privileged from production although it was prepared before the present or any litigation was contemplated (*Minet v Morgan*, L R. 8 Ch. 361) This is so, even though it is alleged to contain a libel on his opponent (*Lowden v Blakey*, 23 Q B D. 332) So are all documents prepared by a solicitor with a view to the pending or some previous litigation. (*Calcraft v Guest*, (1898) 1 Q. B 759, *Goldstone v Williams, Deacon & Co.*, (1899) 1 Ch 47, *Ainsworth v Wilding*, (1900) 2 Ch 315) So are all opinions of counsel Thus a plaintiff suing *in formâ pauperis* cannot be ordered to produce for inspection by the defendant the case laid before counsel under Order XVI. r. 23, and his opinion thereon, even though he has made them exhibits to his affidavit filed in accordance with Order XVI r 24 (*Sloane v Britain Steamship Co., Ltd* , (1897) 1 Q B 185; and see *R v Godstone R D C* , (1911) 2 K B 465.) But when in an action it is specifically alleged with some show of reason that the defendant has been guilty of a crime, or of some definite fraud not amounting to a crime, communications between him and his solicitor relating to the alleged crime or fraud or to its subject-matter, are not privileged from production merely because they passed between solicitor and client, even though it be not alleged that the solicitor was a party to the alleged crime or fraud (*Postlethwaite v. Rickman*, 35 Ch D. 722, *Williams v Quebrada*,

(1895) 2 Ch. 751; *Bullivant v. Att.-Gen. for Victoria*, (1901) A. C. 196.)

4. *Documents prepared with a view to Litigation*.—All documents which are called into existence solely for the purpose of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production. Thus all proofs, briefs, draft pleadings, &c., are privileged; but not counsel's indorsement on the outside of his brief (*Walsham v. Stainton*, 2 H. & M. 1; *Nicholl v. Jones*, 2 H. & M. 588), nor any deposition or notes of evidence given publicly in open Court. (*Goldstone v. Williams, Deacon & Co.*, (1899) 1 Ch. at p. 52.) So are all papers prepared by any agent of the party for the use of his solicitor for the purposes of the action, provided such action be then commenced, or at least imminent. (*M'Corquodale v. Bell*, 1 C. P. D. 471; *Southwark and Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315.) But the privilege does not extend to advisers who are not legal (*Slade v. Tucker*, 14 Ch. D. 824; *Tobakin v. Dublin Southern Tramways Co.*, (1905) 2 Ir. R. 58); nor to letters passing between co-defendants (*Rochefoucauld v. Boustead*, (1897) 1 Ch. 196); nor to communications made to third parties who have to decide whether or not legal proceedings shall be taken. (*Jones v. Great Central Railway*, (1910) A. C. 4.)

5. *Incriminating Documents*.—It is also a ground of privilege that the documents, if produced, would tend to criminate the party producing them. But a party cannot refuse to make an affidavit of documents on the ground that he might thereby criminate himself. He must take the objection in the affidavit. (*Spokes v. Grosvenor Hotel Co.*, (1897) 2 Q. B. 130; *National, &c. v. Smithies*, (1906) A. C. 434.) He alone can raise the objection, and he must do so on oath and in terms clear and express. It is not sufficient for him to swear merely: "the production will, to the best of my information and belief,

tend to criminate me " (*Roe v New York Press*, 75 L T Journal, 31.) But no order for discovery of documents will be made against the defendant in an action brought to recover possession of demised premises, on the ground of an alleged forfeiture by breach of covenant (*Earl of Mexborough v Whitwood*, (1897) 2 Q B 111, overruling *Seaward v Dennington*, 44 W R. 696, and see *Miller v. Waterford Harbour Commissioners*, (1904) 2 Ir R 421.)

6 Documents which are the Property of a Third Person.—A man cannot be compelled to produce documents which he holds merely as agent or trustee for another, if the true owner objects to their production. Thus, if an action be brought against the secretary of a company, he will not be ordered to produce any document, which is the property of the company, if the directors forbid it. The steward of a manor may refuse to produce the court rolls, if the lord objects to their production. So, too, a solicitor who is a party to an action may refuse to produce documents of which he is in possession solely as solicitor for a client. (*Procter v Smiles*, 2 Times L. R. 474; *Ward v Marshall*, 3 Times L R 578) Again, a party will not, as a rule, be ordered to produce documents which are in the joint possession of himself and another person not a party to the action, unless that person consents (*Hadley v McDougall*, L R 7 Ch 312; but see *Rattenberry v Monro* (1910), 103 L T 560) But no privilege can be claimed for private letters written to the deponent by a stranger to the suit, even though they are expressed to be written in confidence, and the writer forbids their production. (*Hopkinson v. Lord Burghley*, L R. 2 Ch 447; and see *M'Corquodale v Bell*, 1 C P D 471)

7 State Documents—Sometimes, also, production is refused on the ground of public policy and convenience. This can only be where one party to the suit is officially in possession of State documents of importance. If the defendant be a

subordinate officer of a public department sued in his official capacity, he cannot on his own authority claim privilege on the ground of public policy; production can only be refused on that ground by the head of the department. (*Beatson v. Skene*, 5 H. & N. 838.) But it is not necessary that the head of the department should himself make an affidavit; so long as it is made clear to the Court that the mind of the responsible person has been brought to bear upon the question, the objection will be upheld. (*Kain v. Farrer*, 37 L. T. 469; *H.M.S. Bellerophon*, 44 L. J. Ad. 5; *Hennessy v. Wright* (No. 1), 21 Q. B. D. 509; *Ford v. Blest*, 6 Times L. R. 295; *In re Joseph Hargreaves, Ltd.*, (1900) 1 Ch. 347.)

Further and better Affidavit.

An affidavit which omits all reference to the documents which the deponent once had, but has not now, in his possession will be deemed an insufficient compliance with the order, and a further and better affidavit will be ordered. (*Wagstaffe v. Anderson*, 39 L. T. 332.) But if an affidavit of documents be drawn up in proper form, it is as a rule conclusive. No affidavit in reply thereto will be permitted. If, however, it can be shown from the affidavit of documents itself, or from the documents disclosed in it, or from any admission on his pleadings, that the deponent has in his possession other material documents which he has not disclosed, a further affidavit will be ordered. (*Kent Coal Concessions, Ltd. v. Duguid*, (1910) 1 K. B. 904; (1910) A. C. 452.)

Production and Inspection.

A Master at Chambers may at any stage of the action order any party to produce on oath such of the material documents in his possession or power as the Master shall think right; and may deal with such documents when produced in such manner as shall appear just. (Order XXXI. r. 14.) The

party producing any book or document may seal or cover up any part which he can swear is not material to any issue in the action. (*Blanc v. Burrows*, 12 Times L R 521; *Graham v. Sutton & Co*, (1897) 1 Ch 761; *Pardy's Mozambique Syndicate, Ltd v Alexander*, (1903) 1 Ch 191) No order will be made for inspection of a document which is not relevant to any issue in the action, even though it has been disclosed in the affidavit (*Hope v Brash*, (1897) 2 Q B 188) It is not an answer to an application for production of documents that they are in the hands of the deponent's former solicitors, who claim a lien over them for costs, and that he disputes the bill, but the order for production will contain liberty to apply in case he really cannot obtain the documents (*Lewis v. Powell*, (1897) 1 Ch 678)

The inspecting party is entitled to make a copy of any document produced to him. (*Ormerod, Grierson & Co v St George's Ironworks*, (1905) 1 Ch 505.) In a proper case (e g, where one party denies that he wrote an important document which purports to be in his handwriting), the Master will order the party in possession of the document to permit his opponent to take photographic or facsimile copies of it; of course at his own expense. (*Davey v Pemberton*, 11 C B N. S. 628, *Lewis v. Earl of Londesborough*, (1893) 2 Q B. 191)

It is on an application under rule 14 that the validity of any claim of privilege from inspection is generally tested. The Master may now himself in every case inspect the document, if he thinks fit (Rule 19A (2), *Ehrmann v Ehrmann*, (1896) 2 Ch 826.) Otherwise the only question is whether the deponent has in his affidavit said enough about the document to entitle him to refuse production on the ground of privilege; unless the Master is satisfied that the deponent has misrepresented or misconceived its effect. (*Roberts v. Oppenheim*, 26 Ch. D. 724)

Any party to the action may also be ordered to attend at any stage of the proceedings for the purpose of producing any document named in the order (Order XXVII. r. 7; *Straker v. Reynolds*, 22 Q B D 262, *Elder v. Carter*, 25 Q. B D. 194) A person not a party to the action may be ordered to attend and produce certain books and documents before an examiner appointed by the Court (*Zumbeck v. Biggs*, 48 W. R 507, 82 L. T 654)

CHAPTER XVII.

INTERROGATORIES.

BESIDES Discovery of Documents the parties may also require Discovery of Facts. Indeed, they will especially require this in those cases where there are no material documents to be disclosed. For it is in those very cases that there is almost sure to be a conflict of evidence, and that makes it all the more desirable for the parties to ascertain before the hearing what are the exact points on which there will be this conflict. Take, for instance, an action for personal injuries caused by a collision on a railway. There are often no documents existing which throw any light on such a matter. Yet it is most important for the plaintiff to know before he comes into Court whether at the trial the defendants will seriously contend that no such collision ever took place, or that the plaintiff was not a passenger in either train on the day of the collision, or that he was not injured thereby. Hence in a proper case the Court allows one party to administer a string of questions to the other, and compels that other to answer them on oath before the trial, and the admissions obtained by means of these "Interrogatories" often save trouble and expense in preparing for the trial. Sometimes, however, both discovery of documents and interrogatories are necessary, and then, if there be time, discovery of documents should generally be asked for first, for inspection of the documents disclosed may render unnecessary some of the proposed interrogatories

As a general rule, interrogatories will be allowed whenever

the answers to them will serve either to maintain the case of the party administering them or to destroy the case of his adversary (*per* Esher, M R , in *Hennessy v. Wright* (No 2), 24 Q B D at p 447, n , and *per* Stirling, L. J , in *Plymouth Mutual, &c Society v Traders' Publishing Association*, (1906) 1 K. B at p 416), but "ever since they were first invented, it has been recognised that they constitute a process which might become oppressive, and be used for improper purposes, and therefore that the allowance or disallowance of interrogatories is a matter for discretion, and they should be allowed or disallowed on the merits of the particular case" (*Per* Vaughan Williams, L. J., in *Heaton v. Goldney*, (1910) 1 K. B. at p. 758) On any summons for directions either party may apply to the Master for leave to deliver interrogatories, and for an order that his opponent answer them on oath within ten days, or within such other time as may be allowed (Order XXXI rr. 1, 8) As a rule, except by consent, interrogatories are not delivered until after the Defence; as the Defence may contain admissions which will render some of the interrogatories unnecessary The particular interrogatories proposed to be delivered must be submitted to the Master, who will allow such of them only as he considers necessary either for disposing fairly of the matter or for saving costs (Order XXXI. r 2) He will "take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them." (*Ib.*; and see *Cochrane v Smith and others* (1895), 12 Times L. R. 78.) Moreover, the party interrogating may be ordered, before delivering the interrogatories to his opponent, to pay into the "Security for Costs Account" a sum of money fixed by the Master, but such an order is now seldom made (r 26).

The object of interrogating is twofold first, to obtain admissions to facilitate the proof of your own case, secondly, to ascer-

tain, so far as you may, the case of your opponent. There is therefore some art required in drawing interrogatories. Think rather of the answer the defendant will probably give you than of the answer which you are instructed he ought to give. The defendant's version of the matter must differ from the plaintiff's version, and your object is to discover precisely where and to what extent they differ. Your questions then should be framed so as to elicit, if possible, the admission you desire, and at the same time, failing that admission, to get, at all events, some definite statement sworn to, from which the party interrogated cannot afterwards diverge. Leave him no loophole of escape. If he will not answer the question your way, still at least find out how far he is prepared to go in the opposite direction. To secure this, it is well to ask a series of short questions, not one long question. Each additional detail should be put in a question by itself.

Illustrations.

Thus, if you are instructed that the plaintiff gave evidence in the Bankruptcy Court, in the presence of a Mr. Henderson, that a certain cheque was in the handwriting of the defendant, it will be of little use to ask merely "Did you not state on oath, in the Bankruptcy Court, in the presence of J. Henderson, that the said cheque was in the defendant's handwriting?" as the plaintiff will simply answer "No." The only way to discover precisely what it is the plaintiff denies is to split the question up into several—"Were you not examined as a witness in the Bankruptcy Court on the 15th of May, 1910, or some other and what day? Was not a cheque then and there produced to you? Was not the said cheque the one mentioned in paragraph 4 of the Statement of Claim, or some other and what cheque? Did you not state that such cheque was in the handwriting of the defendant? Did you not state so on oath? Did you not state so in the presence of one John Henderson? If nay, in whose handwriting did you state the said cheque to be?"

Here is a bad interrogatory "Do you deny that the delay occasioned in the signing of the contract for the sale of the said brewery to the said purchasers arose wholly or in part from the fact that the 'tied houses' alleged to be connected with the said brewery were not in your possession or connected with the said brewery?" This should be split up into eight or nine separate questions. As it stands, it assumes the existence of numerous facts, each of which may be in dispute. Possibly only one of them may be really in dispute, but an interrogatory in this shape will not help you to ascertain which one that is.

And see Precedents, Nos. 114—117.

What Interrogatories are Admissible.

There are certain rules which determine what interrogatories may be administered and what not:—

- ✓ 1. Interrogatories must be relevant to the matters in issue. If particulars have been delivered which restrict the issue, the interrogatories must be confined to the matters stated in such particulars. (*Yorkshire Provident Co. v. Gilbert*, (1895) 1 Q. B. 148; *Arnold & Butler v. Bottomley and others*, (1908) 2 K. B. 151.) Not every question which could be asked a witness in the box may be put as an interrogatory. Thus, questions which are only put to test the credibility of the witness (questions “to credit,” as they are called) will not be allowed, although of course they may be asked in cross-examination. (See the concluding words of Order XXXI. r. 1.) “We have never allowed interrogatories merely as to the credibility of a party as a witness.” (*Per Cockburn, C. J.*, in *Labouchere v. Shaw*, 41 J. P. 788.)

Again, no question need be answered which is not put *bonâ fide* for the purposes of the present action, but with a view to future litigation. (*Edmondson v. Birch & Co., Ltd.*, (1905) 2 K. B. 523.) Interrogatories will not be allowed that are oppressive, that is, which put an undue burden on the party interrogated (*Heaton v. Goldney*, (1910) 1 K. B. 754); nor if their object be only to establish certain facts which, if proved, would be no defence in law to the action. (*Rogers & Co. v. Lambert & Co.*, 24 Q. B. D. 573.)

Illustrations.

The publisher of a newspaper must answer the interrogatory: “Was not the passage set out in paragraph 3 of the Statement of Claim intended to apply to the plaintiff?” But he need not answer the further question, “if not, say to whom?”; as, if the passage did not refer to the plaintiff, it is immaterial to whom it referred, so far as the present action is concerned.

Wilton v. Brignell, (1875) W. N. 239.

So a defendant cannot be asked "If you did not print the libel, did M'C & Co, or some other and what firm, print it?"

Pankhurst v Wighton & Co, 2 Times L. R. 745.

"If A's carriage is damaged by a collision in the street, and B. is sued for damages as having caused the collision . . . A. must establish that the vehicle which ran into his carriage was B's vehicle, and he ought not to be allowed to interrogate B to say if it was not B's vehicle, whose vehicle it was."

Per Cozens-Hardy, M. R., in *Hooton v. Dalby*, (1907) 2 K. B. at p. 20.

If the proprietor of a newspaper accepts liability for a libel which has appeared in his paper, he cannot be interrogated as to the name of the writer of the libel, or of the person who sent it to him for publication, unless the identity of such person is a fact material to some issue raised in the present action

Hennessey v Wright (No. 2), 24 Q. B. D. 445, n., 36 W. R. 879.
Gibson v. Evans, 23 Q. B. D. 384, 58 L. J. Q. B. 612, 61 L. T. 388.

Hope v. Brash, (1897) 2 Q. B. 188, 66 L. J. Q. B. 653, 45 W. R. 659, 76 L. T. 823.

Edmondson v Birch & Co Ltd., (1905) 2 K. B. 523, 93 L. T. 462.

It is otherwise if the libel be not published in a newspaper

White & Co v. Credit Reform Association, &c., Ltd., (1905) 1 K. B. 653, 74 L. J. K. B. 419, 53 W. R. 369, 92 L. T. 817.

An action was brought for a declaration that a piece of land which had been purchased by the defendant and C. in 1873 was purchased by them as co-partners, and for accounts of the partnership, &c. The defendant denied the partnership. The plaintiff interrogated the defendant as to other purchases of land made by him and C. both before and after 1873, in order to prove that they had been co-partners in these other purchases. *Held*, that these interrogatories were irrelevant to the issue in the action and oppressive, and that they ought not to be allowed

Kennedy v. Dodson, (1895) 1 Ch. 334, 64 L. J. Ch. 257, 43 W. R. 259, 72 L. T. 172.

Interrogatories asking plaintiff whether similar charges had not been made against him previously in a newspaper, and whether he had contradicted them or taken any notice of them on that occasion, are clearly irrelevant.

Pankhurst v Hamilton, 2 Times L. R. 682

But interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely, they should

be, and generally are, directed to the evidence by which it is desired to establish such facts at the trial (*Att-Gen v Gaskill*, 20 Ch D 519) Either party may interrogate as to any link in the chain of evidence necessary to substantiate his case; the question is relevant as leading up to a matter in issue in the action

Illustrations

If the defendant denies that he wrote a material document, he may be asked whether other documents produced to him are not in his handwriting, though such other documents have nothing to do with the action, but will only be used for comparison of handwriting

Jones v. Richards, 15 Q B D 439, 1 Times L. R. 660

When a defendant has pleaded that his words are true, he may interrogate as to any fact material to his case on that issue.

Marriott v. Chamberlain, 17 Q B. D. 154, 55 L J Q B. 448.

Peter Walker and Son, Ltd v. Hodgson, (1909) 1 K B 239, 78 L J. K B 193, 99 L. T 902.

Where the defendant in an action of libel or slander has pleaded that he published the words complained of "in good faith and without malice" or "in the honest belief that they were true," he may be asked what information he had at the date of publication that induced him to believe that the words were true, and what steps, if any, he had taken, before publishing the words, to ascertain whether they were true or not

Elliott v. Garrett, (1902) 1 K. B 870, 86 L T. 441.

Saunderson v Baron Von Radeck, (1905) 119 L T Jo 33 (H. L.).

But similar interrogatories were disallowed in an action for malicious prosecution

Maass v Gas Light and Coke Co, (1911) 2 K. B 543, 104 L. T. 767.

In some cases also interrogatories are admissible as to matters which are only relevant in aggravation or mitigation of damages; but as a rule such interrogatories are not encouraged. (*Heaton v Goldney*, (1910) 1 K. B. 754)

Illustrations.

Where the defendant has delivered a notice in mitigation of damages under Order XXXVI. 1 37, he may administer interrogatories to the plaintiff, as to the matters referred to in such notice. [And, I presume,

the plaintiff may also interrogate the defendant on such matters, though not perhaps with the same minuteness]

Scarfe v. Kemp & Co., (1892) 2 Q. B. 319, 61 L. J. Q. B. 515.

A plaintiff is entitled to obtain an approximate statement in round numbers of the circulation of any obscure newspaper, in which a libel has appeared. But in the case of any well-known London or provincial newspaper such an interrogatory would be held unnecessary and vexatious.

Whittaker v. "Scarborough Post," (1896) 2 Q. B. 148, 65 L. J.

Q. B. 564; 44 W. R. 657, 74 L. T. 753.

Rumney v. Walter, 61 L. J. Q. B. 149; 40 W. R. 174.

James v. Carr, 7 Times L. R. 4

Overruling on this point, *Parnell v. Walter*, 24 Q. B. D. 441.

Prior to the passing of the Law of Libel Amendment Act, 1888, interrogatories were disallowed which asked the plaintiff for particulars of sums already recovered by him in other actions in respect of other publications of the same libel. But now such interrogatories would, it is submitted, be admissible under sect. 6 of that Act.

Tucker v. Lawson, 2 Times L. R. 593.

2 The party interrogating may put his whole case to his opponent if he thinks fit, though it is not always wise to do so; he may also interrogate in full detail as to matters common to the case of both parties; but he is not entitled to obtain more than an outline of his opponent's case. He can compel his adversary to disclose the facts on which he intends to rely, but not the evidence by which he proposes to prove those facts (*Lever Brothers v. Associated Newspapers*, (1907) 2 K. B. 626, 629). He cannot claim to "see his opponent's brief," or ask him to name the witnesses whom he means to call at the trial. (*Knapp v. Harvey*, (1911) 2 K. B. 725). The party interrogating may ask anything to support his own case or answer his opponent's case, he is entitled to know precisely what is the charge made against him, and what is the case which he will have to meet. But he is not entitled to discover in what way his opponent intends to prove his case. (*Johns v. James*, 13 Ch. D. 370; *Ashley v. Taylor*, 37 L. T. 522, (C. A.) 38 L. T. 44, *Ridgway v. Smith & Son*, 6 Times L. R. 275)

Illustrations

In an action for the recovery of land, the defendant is entitled to know the facts showing the nature of the plaintiff's title, and he may, therefore, administer to the plaintiff interrogatories as to the links through which he traces his pedigree, &c ; but he is not allowed to inquire into the evidence by which the plaintiff seeks to prove his title.

Fletcroft v. Fletcher, 11 Ex. 543, 25 L. J. Ex. 94.

Horton v. Bott, 2 H. & N. 249, 26 L. J. Ex. 267

Stoate v. Rew, 14 C. B. N. S. 209, 32 L. J. C. P. 160.

Garland v. Oram, 55 J. P. 374

The plaintiff in such an action is entitled to interrogate the defendant on all matters relevant to his own case, and he will not be deprived of that right merely because such discovery may have the effect of disclosing the defendant's case. But he cannot compel the defendant to disclose any matter which relates exclusively to his own title.

Lyell v. Kennedy, 8 App. Cas. 217, 52 L. J. Ch. 385.

Pye v. Butterfield, 5 B. & S. 829; 34 L. J. Q. B. 17, 13 W. R. 178.

Miller v. Kirwan, (1903) 2 Ir. R. 118

In an action for seduction in which the defendant denied that he was father of the child, the plaintiff sought to interrogate the defendant as to whether he alleged carnal intercourse with the plaintiff's daughter by other persons, and, if so, by whom. The interrogatory was not allowed.

Hooton v. Dalby, (1907) 2 K. B. 18, 76 L. J. K. B. 652, 96 L. T. 537.

On an issue whether the plaintiff is or is not a moneylender, the defendant is entitled to administer interrogatories to the plaintiff as to what (if any) other loans he had transacted during a reasonable period before the loan in question, and on what security and at what rate of interest, and generally as to the circumstances and terms of such loans, but not to require the plaintiff to disclose the names of the borrowers.

Nash v. Layton, (1911) 2 Ch. 71; 104 L. T. 834.

A party cannot be asked to give the names of those who were present when any material act was done. This would be asking him to name his witnesses.

Eade v. Jacobs, 3 Ex. D. 335, 47 L. J. Ex. 74, 26 W. R. 159.

But if the party interrogating is in other respects entitled to certain information, he will not be debarred from it merely because supplying it will necessarily disclose the names of persons whom the party interrogated may hereafter wish to call as his witnesses, or otherwise give some clue to his evidence.

Marriott v. Chamberlain, 17 Q. B. D. 154, 55 L. J. Q. B. 448.

Birch v. Mather, 22 Ch. D. 629, 52 L. J. Ch. 292

He never introduced to the defendants any person able and willing to purchase the said ground rents at the price mentioned in the letter set out in the Statement of Claim.

3 By the express terms of the said letter, it was a condition precedent to the plaintiff's right to recover any commission that he should, on or before the 17th January, 1911, forward to the defendants the name and address of some person able and willing to purchase the said ground rents at the price mentioned in the said letter. The plaintiff did not forward to the defendants the name or address of any such person on or before the said date, or at all.

4 By the express terms of the said letter the plaintiff was only to be paid the commission, if any, due to him out of the purchase-money paid to the defendants by a purchaser introduced to them by the plaintiff. No purchaser introduced by the plaintiff has ever yet paid any purchase-money to the defendants.

No 78

"EXTRAS" TO A BUILDING CONTRACT

1 By a contract under seal, dated January 19th, 1910, and made between the plaintiffs and the defendants, the plaintiffs agreed to do the work and labour, and to supply the materials therein specified for the defendants for the sum of 2,790/.

2 The plaintiffs did the work and labour, and supplied the materials therein specified, and the defendants have paid the plaintiffs the said sum of 2,790/. They have also paid to the plaintiffs the sum of 739/ for "extras". They thus before action satisfied the plaintiffs' whole claim under the said contract.

3 As to all work, labour and materials other than those for which the defendants so paid the plaintiffs before action the defendants never ordered the same, or any part thereof. No such work and labour has been done, and no such materials have been supplied by the plaintiffs for or to the defendants at their request or at all.

4 The defendants never agreed to pay the plaintiffs the prices which they have charged for the said work, labour, and materials. Such prices are excessive and unreasonable.

5 If, however, the plaintiffs are claiming the sum of

McColla v Jones, 4 Times L R 12

Ashworth v. Roberts, 45 Ch. D. 623, 60 L J Ch. 27.

Thus, a plaintiff is entitled to interrogate the defendant as to whether he did not speak the words complained of in the presence of persons named in the plaintiff's particulars or any and which of them.

Dalgleish v. Lowther, (1899) 2 Q B 590; 68 L. J Q. B 956

And see cases cited as to particulars, *ante*, pp. 183, 184

3. But even in interrogating as to your own case, the questions asked must not be "fishing," that is, they must refer to some definite and existing state of circumstances, not be put merely in the hopes of discovering something which may help the party interrogating to make out some case. They must be confined to matters which there is good ground for believing to have occurred. "Fishing" interrogatories are especially objectionable when their object is to get at something which may support a plea of justification in an action of libel. (*Gourley v Plimsoll*, L. R 8 C P. 362, *Buchanan v. Taylor*, (1876) W. N. 73, *Hennessy v Wright* (No. 2), 24 Q. B D. at pp. 448, 449)

Illustrations.

Where the plaintiff was charged with having used certain blasphemous phrases, interrogatories were disallowed as "fishing," the object of which was to show that if plaintiff had not said what he was charged with saying, still he had on other occasions said something very much like it.

Pankhurst v Hamilton, 2 Times L. R 682

But the defendant in an action of slander may be asked whether he did not speak "the words set out in paragraph 3 of the Statement of Claim, or some and which of them, or some other and what words to the same effect"

Dalgleish v. Lowther, (1899) 2 Q. B 590; 68 L. J. Q B. 956

Saunderson v. Baron Von Radeck (1905), 119 L. T. Jo. 33 (H. L.).

4 In the King's Bench Division interrogatories are not allowed as to the contents of written documents, unless it is

proved or admitted that such documents have been lost or destroyed. (*Stein v Tabor*, 31 L T 444, *Fitzgibbon v Greer*, Ir R. 9 C L 294) Nor will interrogatories be allowed, the object of which is to contradict a written document (*Moor v Roberts*, 3 C B. N S. 671) But you may ask what has become of a particular document, and continue. "If you state that such document is lost or destroyed, set out the contents of the same to the best of your recollection and belief. If you have a copy, make it an exhibit to your answer" (See *Wolverhampton New Waterworks Co v Hawksford*, 5 C B. N S 703, *Dalrymple v Leshe*, 8 Q. B D 5) In the Chancery Division an interrogatory as to the contents of a written document is allowed in special circumstances, *e g*, where production of the original document has been refused on a valid but technical ground of privilege (*Rattenberry v. Monro* (1910), 103 L T 560)

If the party from whom discovery is sought has not made an affidavit of documents he may be interrogated as to any document which there is good reason for believing was once, at all events, in his possession, *e g*, he may be asked whether that particular document was ever in his possession or control, whether he did not receive it from a certain person on a given day, whether it is not now in his possession or control, if nay, when did he part with it, and to whom? There is authority for saying that such interrogatories may also be put although the party interrogated has made an affidavit of documents (*Lethbridge v Cronk*, 44 L J C P 381; *Jones v Monte Video Gas Co*, 5 Q B D at p 558) But since those decisions the Court has expressed the greatest reluctance to going behind the party's affidavit in such a case, and the later decisions leave it very doubtful whether any such interrogatories can ever be administered after discovery of documents (See, especially, *Hall v Truman*, 29 Ch. D 307, and *Morris v. Edwards*, 15 App Cas 309) In such a case the safer course is to apply under Order XXXI. r 19A (3), *ante*, p 265.

5. Questions which tend to criminate may be asked if they

are relevant, though the party interrogated is not bound to answer them. (*Alabaster v. Harness*, 70 L. T. 375; and see *post*, p. 289) That the interrogatories will tend to criminate others is no objection, if they be put *bonâ fide* for the purposes of the present action (*McCorquodale v. Bell*, (1876) W. N. 39.) That to answer them would expose the party interrogated, or third persons, to civil actions was never an objection (*Tetley v. Easton*, 18 C. B. 643)

6. No interrogatories can be administered to the defendant in an action for the recovery of land, if the answers might subject him to a forfeiture. Thus, a tenant cannot be interrogated as to whether he has not assigned or underlet the premises contrary to a covenant in his lease. (*Fane v. Atlee* (1700), Eq. Abr. 77, *Lord Uxbridge v. Staveland* (1747), 1 Vesey, Senior, 56, *Pye v. Butterfield* (1864), 5 B. & S. 829, *Earl of Mexborough v. Whitwood*, (1897) 2 Q. B. 111) But he may be interrogated as to whether his term or other interest has not expired or been duly determined by a notice to quit. (*Wigram on Discovery*, 81.) Again, leave will not be given to administer interrogatories in any action brought to recover penalties under a statute (*Martin v. Treacher*, 16 Q. B. D. 507; *Jones v. Jones*, 22 Q. B. D. 425, *Hobbs & Co. v. Hudson*, 25 Q. B. D. 232, *Saunders v. Weil*, (1902) 2 Q. B. 321; *Derby Corporation v. Derbyshire C. C.*, (1897) A. C. 550.)

7. Moreover, the Court has now, since 1893, a wider discretion as to interrogatories, and only such interrogatories will be allowed as the Master "shall consider necessary either for disposing fairly of the cause or matter or for saving costs." (Order XXXI r. 2, and see *Cochrane v. Smith*, 12 Times L. R. 78.)

Answers to Interrogatories.

The interrogatories allowed by the Master must be answered in full detail and on oath within the time prescribed by him, unless some valid objection can be raised to them. They cannot now be set aside, unless they are, as a whole, "exhibited unreasonably or vexatiously," or unless any one or more of them is or are prolix, oppressive, unnecessary, or scandalous. (Order XXXI r. 7, *Oppenheim & Co v Sheffield*, (1893) 1 Q B 5) Any objection to particular interrogatories, or portions of interrogatories, on the ground that they are irrelevant, or "fishing," &c, must be taken in the affidavit in answer, and is no ground for an application to set the interrogatories aside (*Dalgleish v Lowther*, (1899) 2 Q. B 590.) On the other hand, the fact that the Master at Chambers, or even the judge, has allowed the interrogatories to be administered, does not amount to a decision that the party interrogated is bound to answer them; he may still raise, in his affidavit in answer, any objection to answering them which he might otherwise have taken (*Peek v Ray*, (1894) 3 Ch 282.)

The phrase "unreasonable or vexatious" is taken to refer to the time at which the interrogatories are exhibited, and construed to mean "premature" A "scandalous" interrogatory may be defined as an insulting or degrading question, which is irrelevant or impertinent to the matters in issue "Certainly nothing can be scandalous which is relevant" (*Per Cotton, L J*, in *Fisher v. Owen*, 8 Ch. D 653, and see *Kemble v. Hope*, 10 Times L R 254.) Questions which tend to criminate are not scandalous, unless they are either irrelevant or "fishing" (*Allhusen v. Labouchere*, 3 Q. B. D. 654), and will not, therefore, be struck out or set aside, the party interrogated must take the objection on oath in his answer.

The answers must be carefully drawn. The party interro-

gated may answer guardedly, and make qualified admissions only, so long as both the admission and the qualification are clear and definite. He may answer "Yes" or "No" simply, so long as it is clear how much is thus admitted or denied. So, too, it is quite admissible to say, "I do not know," where the matter is clearly not within the deponent's own knowledge or that of his servants. He is not bound to procure information from others for the purpose of answering (*Per* Brett, J, in *Phillips v Routh*, L. R 7 C P. 287) If, however, he "is interrogated about acts which are done in the presence of persons employed by him, their knowledge is his knowledge, and he is bound to answer in respect of that " (*Per* North, J, in *Rasbotham v. Shropshire Union Rail. and Canal Co*, 24 Ch D. at p. 113) A party to a cause is not excused from answering relevant interrogatories on the ground that they are put as to matters which are not within his own knowledge, if such matters are within the knowledge of his agents or servants, and such knowledge was acquired by them in the ordinary course of their employment. A banker or solicitor may be such an agent. (*Alliott v. Smith*, (1895) 2 Ch. 111) In such a case the party interrogated is bound to obtain the information from such agents or servants unless he can satisfy the Master that it would be unreasonable to require him to do so. The officer of a company, answering interrogatories on its behalf, is only bound to answer as to his knowledge acquired in the course of his employment by the company; he is not bound to disclose information acquired by him accidentally or in some other capacity. (*Welsbach, &c. Co. v. New Sunlight Co.*, (1900) 2 Ch. 1.)

Illustrations.

Action by the owners of a cargo against the owners of a ship for a loss alleged to have arisen from negligence in the navigation which caused the ship to run ashore and be stranded. Interrogatories as to what was done by those on board with regard to such navigation at the time of the

accident. The defendants answered that they were not on board at the time, and had no knowledge or information respecting the matters inquired into, except as appeared by the protest, of which the plaintiffs had had inspection. This answer was held insufficient, as it did not appear that there was any difficulty in the defendants obtaining the required information from those who were in charge of the ship at the time of the accident.

Bolckow, Vaughan & Co v Fisher and others, 10 Q. B. D. 161, 52 L. J. Q. B. 12, 31 W. R. 235, 47 L. T. 724.

Action by owners of water-mills against a canal company for wrongfully diminishing the quantity of water in the river, to the injury of the plaintiffs. The defendants interrogated the plaintiffs, and asked them to give a list of the days between specified dates on which they alleged that the working of their mills was interfered with by the negligence of the defendants. The plaintiffs answered that they were unable to specify the particular days — *Held*, that this answer was sufficient, and that the plaintiffs were not bound to state whether they had made inquiries of their agents, servants, and workmen.

Rasbotham v Shropshire Union Rail. and Canal Co., 24 Ch. D. 110, 53 L. J. Ch. 327, 32 W. R. 117, 48 L. T. 902.

Action for the value of certain missing casks, of which full particulars were given. Interrogatories by the plaintiffs asking whether the defendant company had not received the casks, whether they had lost them, or what had become of them. The information asked for was admittedly contained in the books of the defendant company, or of their agents, Messrs Pickford & Co. and Chaplin & Hoine. The defendant company refused the information, on the ground that it would be a great trouble to search through all these books for many years back, and that such an inquiry would be attended with great expense. — *Held*, by Lord Coleridge, C. J., and Denman, J. (Grove, J., *dissentiente*), that the defendant company must answer the interrogatories.

Hall v L. & N. W. Rail. Co., 35 L. T. 848.

But it is not reasonable to require a party to make admissions as to matters which are not within his own knowledge, and as to which he can only obtain information by writing to his rivals in the trade, or by asking his own servants for information which they have acquired accidentally and not in the course of their employment by him.

Ehrmann v Ehrmann, (1896) 2 Ch. 611, 65 L. J. Ch. 745, 45 W. R. 149, 75 L. T. 37.

Welsbach, &c. Co. v. New Sunlight Co., (1900) 2 Ch. 1, 48 W. R. 595.

Any objection to answering any one or more of several inter-

rogatories should be taken in the affidavit in answer (Order XXXI. r 6) They are usually in the following or some similar form.—

1. "I object to answer the third interrogatory, on the ground that it is irrelevant, and is not put *bonâ fide* for the purposes of this action."

2. "I object to state the evidence by which I intend to establish the facts set out in paragraphs 4, 5, and 6 of my Defence." "I object to name my witnesses " (But see *Marriott v Chamberlain*, 17 Q B D 154, *ante*, p 282)

3 "I object to answer the fifth interrogatory, on the ground that it is a fishing interrogatory, put for the purpose of making out some case under the defendant's plea of justification "

4. "I object to state the contents of a written document ", or, "the said document when produced will be the best evidence of its own contents " The following answer was held sufficient in *Dalrymple v. Leshe* (8 Q. B. D 5) "I kept no copy and have no copy of the said letter, and I am unable to recollect with exactness what the statements contained therein were "

5 If the person interrogated be a solicitor, it is a sufficient answer to state, "I have no personal knowledge of the matter referred to in this interrogatory, and the only information and belief that I have received or have respecting any of such matters has been derived from and is founded on information of a confidential character procured by me as solicitor of the said C , and not otherwise, for the purpose of litigation between the plaintiff and the said C , either pending or threatened by the plaintiff I claim to be privileged from answering this interrogatory further " (*Procter v Smiles*, 55 L J Q B 467, 527) Similarly, a client may refuse to disclose information which he only obtained from his solicitor since action, and which was the result of inquiries instituted by the solicitor for the purposes of the litigation (*Procter v Raikes*, 3 Times L R. 229)

6. "In answer to the fifth interrogatory, I say that to answer the said interrogatory would tend to criminate me, wherefore I respectfully decline to answer the same ", or, "wherefore I humbly submit that I am not bound to make any further or other answer to the same " This objection must be stated in clear and unequivocal language In *Lamb v Munster* (10 Q. B. D 110), it was held sufficient for the defendant to state on oath, "I de-

cline to answer all the interrogatories upon the ground that my answer to them might tend to criminate me " (And see *Jones v Richards*, 15 Q B D 439)

A fuller form of objection will be found *post*, Precedent No 118

Further and Better Answers

If the answers are insufficient or evasive, the party interrogating may, by notice under Order XXX. r 5, call on the deponent to show cause why he should not make and file a further and better affidavit in answer The notice should specify the interrogatories or parts of interrogatories to which a better answer is required (*Anstey v N. & S Woolwich Subway Co.*, 11 Ch. D 439), it should be given within a reasonable time after the answers are delivered (*Lloyd v Morley*, 5 L R Ir. 74) The notice may ask in the alternative that the deponent be examined *vivâ voce* before a Master (Order XXXI. r. 11.) But such an order is seldom made.

So too if the deponent introduces into his affidavit irrelevant matter, which prevents his opponent from making a fair use of the answers, the party interrogating may apply to have such matter struck out.

Default in making Discovery

Any party failing to answer interrogatories, or to discover or produce or allow inspection of documents as ordered, is liable to attachment; and, if a plaintiff, to have his action dismissed for want of prosecution; if a defendant, to have his Defence, if any, struck out, and to be placed in the same position as if he had never pleaded (Order XXXI r 21, *Salomon v Hole*, 53 W. R 588) This is a highly penal provision, and will only be enforced in the last resort, where it seems clear that the party in default really intends not to comply with the order of the Court Hence, before making any application of this kind, the other party should obtain a peremptory order insisting on such discovery being made within a time specified in the order.

CHAPTER XVIII.

ADVICE ON EVIDENCE.

As soon as notice of trial is given, or in urgent cases even sooner, the papers are laid before counsel for his advice on evidence. This should be done by both sides, even in cases apparently simple; else the action may be lost for want of some certificate or other formal piece of proof, as in *Collins v. Carnegie* (1 A. & E. 695). Every document in the case should be sent to counsel, especially the affidavits of documents, the answers to interrogatories, and the draft notices to produce, and to inspect and admit, the various documents in the case. Also some statement as to the oral evidence proposed to be given, if not the full proofs which will afterwards form part of the brief.

Counsel should first consider whether everything is in proper order for the hearing. The answers to interrogatories or the documents disclosed by the defendant may throw a new light on the matters in dispute. Is any amendment of the pleadings or particulars necessary to enable his client's case to be properly presented at the trial? If so, he must promptly apply for leave to add such new matter. Are his opponent's answers to interrogatories sufficient? Should not more documents be disclosed or produced? Is it desirable for some surveyor or other agent to inspect the *locus in quo*, or take samples of the goods in dispute? If so, an order can be applied for under Order L. r. 3. Should an application be made under the Bankers' Books Evidence Act, 1879? (See *post*, p. 301.) Then, when counsel is satisfied that all preliminaries

are in order, and that all material questions are properly raised on the pleadings, he can proceed to write his Advice on Evidence.

Advising on evidence is, perhaps, the most important piece of work which a junior barrister has to do, success at the trial so much depends on the care with which the case is got up beforehand; and the solicitor, who may have had but little experience in litigious work, will look to counsel for advice on every necessary detail. It has been found by experience that the best and clearest method of advising on evidence is first to set out briefly what are the issues in the action, and on whom the burden of proving each issue lies, and then to state *seriatim* how each is to be proved or rebutted. See Precedents, Nos. 119—123

Burden of Proof

What the issues are appears, or ought to appear, clearly from the pleadings. From the pleadings also it can at once be ascertained on which party lies the initial burden of proof on each issue; though it soon may be shifted to the other party. The "burden of proof" is the duty which lies on a party to establish his case. It will lie on A, whenever A. must either call some evidence or have judgment given against him. As a rule it lies upon the party who has in his pleading maintained the *affirmative* of the issue; for a *negative* is in general incapable of proof. *Ei incumbit probatio qui dicit, non qui negat.* The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the *onus* lies, as a rule, on the plaintiff to establish every fact which he has asserted in the Statement of Claim, and on the defendant to prove all facts which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, &c. But the burden frequently shifts, as the case proceeds, from the person on whom it rested at first to his

opponent This occurs whenever a *prima facie* case has been established on any issue of fact or whenever a rebuttable presumption of law has arisen.

Illustrations.

In an action for recovery of land the defendant is in possession; and it will be presumed in his favour that he is rightly in possession; therefore the plaintiff must begin But as soon as the plaintiff proves that he is the heir-at-law of A., who was in possession of the land at the time of his death last year, the burden of proof is shifted. It is now for the defendant to produce A.'s will, and show a devise to himself. That is a *prima facie* answer to the plaintiff's case, and the *onus* once more lies on him. The plaintiff must now give some additional evidence, *e.g.*, to show that A. was not of sound mind when he executed that will, or that he revoked it by a subsequent codicil.

In an action on a bill of exchange, the holder is *prima facie* deemed to be a holder in due course (see ss 29 and 30 of the Bills of Exchange Act, 1882); the *onus*, therefore, lies on the defendant to prove that the acceptance of the bill was obtained by fraud But as soon as this is established, then it is for the plaintiff to prove that he took the bill in good faith, and for value, and without notice of the fraud

Tatam v. Haslar, 23 Q. B. D. 345; 58 L. J. Q. B. 432

In some cases the *onus* lies on one party, although the issue was first raised by his opponent Thus, if a defendant pleads the Statute of Limitations, the *onus* lies on the plaintiff to prove that his cause of action arose within the prescribed period, it does not lie on the defendant to prove the negative.

Wilby v. Hinman, 2 Cr. & M. 658; 4 Tyr. 957.

As a general rule, he who makes an assertion must prove it true, otherwise the jury will deem it untrue. If no affirmative evidence be given, the opposite proposition, the negative of the issue, will be taken as established

Catherwood v. Chabaud, 1 B. & C. 150, 2 D. & R. 271.

The precise form into which the pleading is cast does not matter, the judge will look at the substance of the allegation. Thus, in a plea of privilege, it is immaterial whether the defendant pleads that he published the words *bona fide*, or that he published them "without malice", in either case the plaintiff must prove malice, if the occasion be held one of qualified privilege

There are, however, exceptions to this rule that the burden of proof lies on the party who affirms Thus, in an action for malicious prosecu-

tion, it is for the plaintiff to establish that there was no reasonable and probable cause for the prosecution

Abrath v. N. E. Rail Co, 11 App. Cas. 247, 55 L. J. Q. B. 457.

Brown v. Hawkes, (1891) 2 Q. B. 718, 61 L. J. Q. B. 151

If the defendant in an action of libel has pleaded a plea under sect. 2 of Lord Campbell's Libel Act, the *onus* lies on him to prove that the libel was inserted without gross negligence *Per* Wills, J, in

Peters v. Edwards, 3 Times L. R. 423.

So where the defendant has sold a book or newspaper which, unknown to him, contains a libel, the *onus* lies on him to prove that it was not through any negligence on his part that he was unaware of the existence of the libel.

Emmens v. Pottle, 16 Q. B. D. 354, 55 L. J. Q. B. 51

Vizetelly v. Mudie's Select Library, Ltd., (1900) 2 Q. B. 170.

So on an issue whether A. be still alive or not, the party asserting the negative, viz., that A. is not living, must prove his death, the presumption is in favour of the continuance of life, till the contrary be shown, or until seven years have elapsed since he was last heard of

Wilson v. Hodges, 2 East, 312

In re Benjamin, (1902) 1 Ch. 723; 86 L. T. 387.

In re Aldersey, (1905) 2 Ch. 181; 74 L. J. Ch. 548.

Having determined what facts his client has to prove at the trial, counsel proceeds to state how they are to be proved, what witnesses must be called, and what documents must be put in on each issue. Each party must also be prepared with evidence not only to prove the issues which lie upon him, but also to rebut his adversary's case. But remember.—

1 There are some matters which need not be proved at all, *e g*, the law of England, public statutes, official seals, and certain facts so well known that the Court takes judicial notice of them without proof (See, for instance, *George v. Davies*, (1911) 2 K. B. 445) But foreign law, or the custom of any particular county, or of a city such as London or Bristol, or the law of Scotland or Jersey, the practice of an inferior or foreign court, resolutions of the House of Commons (*Stockdale v. Hansard* (1837), 7 C. & P. 731, 736), or the

existence of a war between foreign countries must be proved as facts.

2. Again, neither party need prove that which the law already presumes in his favour, *e g*, the plaintiff in an action of libel need not prove that the words are false, the holder of a bill of exchange need not prove that he gave value for it

3. But even where there is no presumption of law in your favour it is often only necessary for you to give *primâ facie* evidence. You need not prove any fact up to the hilt. The circumstances, though unexplained, may in themselves be sufficient to establish a *primâ facie* case, or some letter may contain an admission which will shift the *onus* of proof on to your opponent.

Illustrations

Strict proof of the plaintiff's special character is not, as a rule, required. In order to prove that a man holds a public office, it generally is not necessary to produce his written or sealed appointment, it is sufficient to show that he acted in that office, and then it will be presumed that he acted legally.

Berryman v Wise, 4 T R 366.

Cannell v Curtis, 2 Bing N. C. 228, 2 Scott, 379.

If a letter be properly addressed to A., and posted, with the postage prepaid, and has not been returned through the Dead Letter Office, it will be presumed that A. received it. But this presumption is rebuttable.

Walthamstow v. Henwood, (1897) 1 Ch. 41, 75 L. T. 375

Where the plaintiff was injured by a barrel of flour falling upon him from a window above the defendant's shop, this was held to be *primâ facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur*.

Byrne v Boadle, 2 H. & C. 722; 33 L. J. Ex. 13

Kearney v. L. B. & S. C. Rail Co, L R 6 Q B. 759

So if a passenger is injured by a collision between two trains belonging to the same company, this is *primâ facie* evidence of negligence, and it lies upon the defendant company to rebut it if possible.

Carpue v. L B Ry. Co. (1844), 5 Q B 747, 751.

On the other hand, the unexplained happening of an accident where the facts are equally consistent with negligence on the part of either party, is no ground for inferring negligence on the part of the defendant.

Wakelin v. L. & S. W. Ry. Co., 12 App. Cas 41, 56 L J.

Q B. 229, 35 W R. 141, 55 L. T. 709.

- East Indian Ry. Co. v. Kalidas Mukerjee*, (1901) A. C. 396; 70 L. J. P. C. 63, 84 L. T. 210
Pomfret v. Lancashire and Yorkshire Rail. Co., (1903) 2 K. B. 718; 72 L. J. K. B. 729, 52 W. R. 66; 89 L. T. 176.

Nor in cases under the Workmen's Compensation Act, 1906, is it any ground for inferring that the accident arose out of or in the course of the employment of the injured workman

- McDonald v. "Banana" Steamship*, (1908) 2 K. B. 926, 78 L. J. K. B. 26, 24 Times L. R. 887.
Marshall v Owners of Steamship "Wild Rose", (1910) A. C. 486, 79 L. J. K. B. 912; 103 L. T. 114
Kitchenham v Owners of S.S. Johannesburg, (1911) 1 K. B. 523, 80 L. J. K. B. 313, 103 L. T. 778, (H. L.) (1911) A. C. 417.
Hewitt v Owners of Ship Duchess, (1910) 1 K. B. 772; 79 L. J. K. B. 867, 102 L. T. 204, (H. L.) 105 L. T. 121.
 But see *Moore v. Manchester Liners, Ltd.*, (1910) A. C. 498; 79 L. J. K. B. 1175, 103 L. T. 226

Witnesses

Counsel must decide what witnesses his client should subpoena to attend the Court to give evidence. It is as well to insert a list of them by name in the Advice on Evidence. If it be necessary to bring up a prisoner to give evidence, an application may be made to the judge *ex parte* for an order, under 16 & 17 Vict. c. 30, s. 9. For this purpose an affidavit must be sworn, stating where the prisoner is confined, and for what crime, and when and where his attendance will be required. In the case, now rare, of a person being confined upon civil process, the above statute does not apply, and a writ of *habeas corpus ad testificandum* must be obtained upon application on affidavit to a judge at Chambers. A lunatic may be brought up from his asylum under such a writ, if he is fit for examination (*Fennell v. Tait*, 1 Cr. M. & R. 584). A witness residing in Ireland or Scotland can be compelled to attend by a *subpoena ad testificandum* issued by the special leave of a judge under 17 & 18 Vict. c. 34, s. 1.

It may be necessary to apply to postpone the trial, *e.g.*, to

secure the attendance of witnesses who are ill or absent abroad. Or it may be necessary to apply for letters of request, or for a commission abroad, or for the examination before trial of a witness who is dangerously ill or about to leave the country (Order XXXVII. rr. 5, 6a) Several foreign Governments object to commissions being issued, and to examiners administering oaths to witnesses within their dominions Hence, now the Foreign Office, at the request of the Lord Chancellor or the Lord Chief Justice, frequently sends through diplomatic channels a letter of request addressed to the tribunal of such other country asking the judges of that tribunal to order the required evidence to be taken and remitted to the English Court This plan is found to be cheaper than the writ of commission, which, however, is still employed for the examination of witnesses in the United States of America, and occasionally in our Colonies The English High Court returns the compliment, and will on request take evidence for a foreign tribunal (Order XXXVII rr. 54—59.)

A defendant will obtain letters of request or a commission more readily than a plaintiff who has chosen his own *forum* (*Ross v. Woodford*, (1894) 1 Ch. 38) The affidavit filed in support of such an application must state the name of at least one witness whom it is desired to examine (*Howard v Dulau & Co* , 11 Times L. R. 451), and the general nature of the evidence which such witness is expected to give (*Barry v Barclay*, 15 C. B. N. S 849.) If such evidence is not directly material to some issue in the cause, but only incidentally useful in corroboration of other evidence, the application will not be granted (*Ehrmann v Ehrmann*, (1896) 2 Ch 611) The plaintiff himself will not, as a rule, be allowed to give his evidence abroad on commission, it should be given before the jury here (*Keeley v Wakley*, 9 Times L R 571.) But a defendant, if resident abroad, will be allowed this indulgence (*New v Burns*, 64 L J Q B. 104) The application is not

usually made till the pleadings are closed, but it may be made earlier, if there be special reasons for such urgency. The application will fail if it can be shown that the witnesses could be brought to England without much greater expense, or that witnesses now in England could give the same evidence. Sometimes the mere delay, which will thus necessarily be caused, is a sufficient reason for refusing the application. The costs of the commission must be borne by the party who applied for it, unless the judge at the trial makes any order in respect of them. It is in every way a misfortune not to have the evidence of an important witness given orally in Court. The deposition, when read aloud at the trial, produces but a faint effect, the jury like to see the man, and hear him examined and cross-examined. Moreover, your opponent learns exactly what your case is, and has plenty of time to prepare his answer to it.

Documentary Evidence

Counsel must next consider what documents will be required to prove his client's case, and also what documents will be needed for the cross-examination of the witnesses called by the other side. On this several questions arise: Are such documents still in existence? In whose handwriting are they? Are they within jurisdiction? If the originals cannot be produced, is any secondary evidence of their contents procurable? If so, is it admissible? Counsel must carefully go through the notice to produce, and the notice to inspect and admit, and advise on their sufficiency. For unless notice has been given to your opponent to produce a document in his possession, you cannot give any secondary evidence of its contents. And unless you give him notice to inspect the documents in your possession, he will not admit them, and then you will have to give strict proof of the handwriting at the trial. If, after notice to admit, your opponent denies his own

handwriting, he will probably, even though he win the action, have to pay the costs of proving this document. But your client, if successful, will not be allowed such costs, unless he served on his opponent notice to admit it, and so gave him the opportunity of saving the expense. (Order XXXII r 2) The admission may be made "saving all just exceptions," and an agreed bundle of correspondence can be put in at the trial, subject to this reservation (Order LXII r 14d)

The rule is that the originals must be produced in Court, if they still exist and can be found within jurisdiction. If they are in the possession of the other side, notice to produce them should be given a reasonable time before the trial, if in the possession of a third person within jurisdiction, he should be served with a *subpœna duces tecum*, if in the possession of a third person out of jurisdiction, all that you can do is to impress upon him the importance of his attending the trial or sending the document, and offer him such inducements as may be necessary. But remember that a third person, not a party, cannot be compelled to produce his title deeds, or to answer any question as to their contents. If the original document be produced, it may be necessary to call witnesses to handwriting as to this, see *post*, p 317. If it be not produced, there may be considerable difficulty in proving a copy, see *post*, p 319.

In addition to the provisions of the common law as to the admissibility in certain cases of secondary evidence, several statutes have been passed which make copies of registers and other public and official documents admissible in evidence, if duly authenticated, although the originals are still in existence, so as to save the necessity for conveying ancient records up and down the country. Such copies are of three kinds—

- (1) An examined copy, *i e*, a copy which someone, who is called as a witness, swears he has compared with the original, and found to be correct and complete

- (ii.) A certified copy, *i e*, a copy which some public officer, officially in charge of the original, certifies to be a true copy, he need not be called as a witness, if he has properly sealed or stamped or otherwise authenticated the copy.
- (iii) An office copy; *i e*, a copy made in the office of the High Court of Justice by an officer having custody of the original, this, in the same Court and in the same action, is accepted as equivalent to the original.

Counsel must be careful to advise the solicitor to obtain the proper kind of copy which is made admissible by the particular Act.

Illustrations.

“Office copies of all judgments, writs, records, pleadings, and documents filed in the High Court of Justice are admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible”

Order XXXVII r. 4, Order LXI. r 7

An affidavit of documents or in answer to interrogatories made in the cause can be proved either by an office copy, or by producing the copy of the affidavit received from the deponent's solicitor, whose act in forwarding it to his opponent amounts to an admission that it is a correct copy.

See *Slatterie v Pooley*, 6 M. & W. 664

A certified copy of an entry in the “Register of Newspaper Proprietors” kept at Somerset House is “sufficient *prima facie* evidence of all matters and things thereby appearing, unless and until the contrary thereof be shown”

44 & 45 Vict. c 60, s 15

The bye-law of a municipal corporation is proved by the production of a written or printed copy authenticated by the corporate seal.

45 & 46 Vict c. 50, s. 24

And see 10 Vict. c. 27, s. 90

The “Law List” is admissible as *prima facie* evidence that everyone whose name appears therein as a solicitor is qualified to practise.

23 & 24 Vict. c. 127, s. 22

Similarly, the "Medical Register" is *primâ facie* evidence that the persons specified therein are duly registered medical practitioners.

21 & 22 Vict. c. 90, s. 27.

A conviction at Assizes or Quarter Sessions can be proved by a certificate under s. 25 of the Common Law Procedure Act, 1854, stating the substance and effect of the indictment and conviction, without the formal parts; a conviction at petty sessions by a similar certificate under s. 18 of the Prevention of Crimes Act, 1871.

Three instances in which the strict rules of evidence have been relaxed deserve especial attention.

(i.) By the Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), as extended by 45 & 46 Vict. c. 72, s. 11, a copy of an entry in the book of any banker or any company carrying on the business of bankers is made *primâ facie* evidence in all legal proceedings of such entry, and of the matters, transactions, and accounts therein recorded, provided (i) that the book was at the time of the making of the entry one of the ordinary books of the bank, and (ii) the entry was made in the usual and ordinary course of business, and (iii) the book is in the custody or control of the bank. The copy must be verified by the affidavit of a partner or officer of the bank, who must state that the copy has been examined with the original entry, and is correct. On the application of any party to an action, an order may be made that he shall be at liberty to inspect and take copies of entries in the books of any bank for the purposes of the litigation (42 Vict. c. 11, s. 7); provided the case be one in which the applicant could, before the Act, have compelled the banker to attend at the hearing and produce his books. (*Arnott v. Hayes*, 36 Ch. D. 731.) Such an order will be made, although the bank be in Ireland or Scotland. (*Kissam v. Link*, (1896) 1 Q. B. 574.) It can be made although the account to which the entries relate is kept in the name of a stranger, provided the entries would be evidence in the action (*South Stafford Tramway Co. v. Ebbsmith*, (1895) 2 Q. B. 669); but in this

case the jurisdiction will be exercised with the greatest caution (*Pollock v. Garle*, (1898) 1 Ch 1) No banker or officer of a bank can be compelled to produce books, or to give evidence of the contents of books which may be proved by copies under the Act, in any proceedings to which the bank is not a party, unless by the order of a judge for special cause (sect 6)

(ii) Where inspection of any business books is applied for, the Master may, if he thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, such affidavit should state whether or not there are in the original book any and what erasures, interlineations, or alterations (Order XXXI r. 19A (1)) And such copies will be evidence against the party supplying them. (*Slatterie v. Pooley*, 6 M & W 664, 669, *Stowe v. Querner*, L R. 5 Ex 155, 159) But the Court or a judge may always order the book from which the copy was made to be produced for inspection

(iii) By the combined effect of sect 3 of the Judicature Act, 1894, and rule 7 of Order XXX, the Master, on the hearing of a summons for directions, has power to "order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise," as he may direct. Unfortunately the Master is seldom asked to exercise this power.

Evidence in Aggravation or Mitigation of Damages

The plaintiff may also bring evidence in aggravation, the defendant in mitigation, of damages (See *ante*, p 103.) In all actions for libel or slander in which the defendant does not by his Defence assert the truth of the statement complained of, his counsel must consider the advisability of giving a notice under Order XXXVI r. 37. For by that rule, "the defen-

dant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence." This rule in no way affects the right of cross-examination, the following rule of the same Order attempts to do that. Again, it in no way alters the substantive rules of evidence, but only the procedure relative thereto. It makes nothing admissible in evidence which was not admissible before. Thus, evidence that the plaintiff is of general bad character is admissible in reduction of damages, but not evidence of particular facts and circumstances tending to show misconduct on his part, still less evidence of rumours prejudicial to his character (*Scott v. Sampson*, 8 Q. B. D. 491, and see the judgment of Phillimore, J., in *Mangena v Wright*, (1909) 2 K. B. at p. 979). The pleading, however, is not the proper place for allegations, which merely go to reduce the damages, they are strictly not "material facts" (See *ante*, p. 103). Yet it is only fair to the plaintiff that he should have some notice before the trial that this peculiarly offensive line will be taken by the defendant. Hence the Rules of 1883 require particulars of such evidence as is otherwise admissible in mitigation of damages to be stated, no longer in the Defence, but in a special notice to be delivered seven days at least before the trial. See Precedent, No. 97.

Mode and Place of Trial

The Master will have dealt with these matters long ago when giving directions, but his decision then is not final, it "may be subsequently altered for sufficient cause" (Order L.IV r. 32). Circumstances may have changed since then; issues may have been raised which alter the complexion of the case.

Counsel should therefore now consider whether it would be better for his client that the action should be tried by a judge alone, or by judge and jury; and if by jury, should it be a common or a special jury? In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage (actions in which the damages are necessarily unliquidated), either party can still secure a trial by jury as of right merely by giving notice in proper time that such is his wish. (Order XXXVI r 2, *Macartney v Macartney* (1909), 25 Times L R 818) In all other cases the trial will be by judge alone, unless an order be made at chambers for a trial by jury. But such an order will be made if either party applies for it within ten days after notice of trial has been given, unless the action is one which could, without any consent of the parties, have been tried without a jury before the Judicature Act, or unless the Master sees clearly that the case involves prolonged examination of documents or accounts, or a scientific or local investigation which cannot conveniently be made by a jury. (Order XXXVI. rr 4—7, *Baring Brothers & Co v. N W. of Uruguay Ry Co*, (1893) 2 Q B. 406) If the parties allow the ten days to pass without applying for a jury, then the Master can make whatever order he thinks right as to trial by jury. So either party can obtain a special jury, if he gives notice in proper time (r 7); if he applies subsequently he cannot obtain a special jury as of right; but there is generally no difficulty in obtaining one, unless the application is made with the object of delaying the trial.

If the trial is to be by judge and jury, counsel should next consider whether it is necessary for the jury to have a preliminary "view" of the *locus in quo*.

Lastly, should he apply to change the venue? There is practically only one ground now on which either party can at this stage of the proceedings ask the Master to change the venue, and that is "local prejudice." The Master will alter

the place of trial if he is satisfied that there is no probability of a fair trial in the place originally fixed, *e g* , if a local newspaper of extensive circulation has recently published unfair attacks on either party with reference to the subject-matter of the action. (*Thorogood v Neuman* (1907), 23 Times L. R. 97) Such extraneous facts must be proved by affidavit.

CHAPTER XIX

TRIAL.

THE action may have been sent for trial to an official or special referee under Order XXXVI. rr. 45—57A, and the Arbitration Act, 1889. If not, it will be tried in the Chancery Division by a judge alone; trial by jury is never allowed there. In any other Division of the High Court it will be tried in one of three ways.—(a) by judge alone, (b) by judge and jury; (c) by a judge with assessors. Assessors are professional or scientific persons who assist the judge with their special knowledge; they are most frequently seen in the Admiralty Court in cases of collision between two vessels. But if any issue in an action in the King's Bench Division requires scientific investigation, an order may be made for the trial of the action before a judge with assessors (*Swyny v. N. E. Ry. Co*, 74 L. T. 88.)

If, when the case is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may proceed to prove his claim, so far as the burden of proof lies upon him, and obtain judgment in the defendant's absence; if the defendant has pleaded a counterclaim, the plaintiff is entitled to have that dismissed at once with costs. (*Lumley v Brooks*, 41 Ch. D 323.) If the defendant appears, and not the plaintiff, the defendant is entitled to judgment at once, dismissing the plaintiff's claim in the action; if he has a counterclaim, he may prove such counterclaim so far as the burden of proof lies upon him. (Order XXXVI. rr 31, 32.) But any verdict or judgment obtained in the absence of one

party may be set aside upon terms, if application be made within six days after the trial. (*Ib.* r. 33.)

If both parties appear, then, as soon as the jury has been sworn, the junior counsel for the plaintiff "opens the pleadings"—that is, he briefly states their effect. But if the action is brought for unliquidated damages, he must not state the amount which the plaintiff claims (*Per* Lord Halsbury, in *Watt v. Watt*, (1905) A. C. at p. 118.) And in no case must he mention the fact that the defendant has paid money into Court, or the amount paid in (*Order XXII.* r. 22.) If the trial be by judge alone, the ceremony of opening the pleadings is generally omitted.

Next may arise the question as to which side has the right to begin. In a civil case, this depends entirely on the pleadings. Whenever the plaintiff claims unliquidated damages, he has the right to begin, unless the defendant has expressly admitted that the plaintiff is *prima facie* entitled to recover the full sum which he claims (*Carter v. Jones*, 6 C. & P. 64; *Mercer v. Whall*, 5 Q. B. 447, 462, 463.) If the damages claimed be liquidated, still, if the defendant has in his Defence traversed any material allegation which is essential to the plaintiff's case, the plaintiff has the right to begin. If one issue be on the plaintiff, it does not matter that there are others which lie on the defendant. But the defendant may have made admissions in his Defence which entitle him to begin. This may have been done purposely, as it is generally an advantage to have the first word with the jury. Besides, if any evidence is called on the opposite side, the first word means the last word too; and to have the last word is always important. The defendant may not make admissions in Court, when the case is called on, which are not on the pleadings, so as to obtain the right to begin (*Price v. Seaward*, Car. & M. 23); unless, indeed, he can persuade the judge to amend the pleadings then and there. If both parties claim the right to begin, the judge

will decide between them according to the pleadings as they stand. The test always is, How would judgment be entered on these pleadings if no evidence at all were given on either side? The party against whom judgment would in that event be given is entitled to begin.

The leading counsel for the plaintiff (if the plaintiff is entitled to begin) now "opens his case" that is, he states in chronological order the facts on which the plaintiff relies, sometimes he deals with the defences pleaded, discounting them in anticipation, sometimes he prefers to leave them unnoticed, and to declare that there is no defence to the action. He must not open any fact which he is not prepared with evidence to prove. As a rule, the opening speech is purposely pitched in a less combative and less confident tone than the same counsel's final reply, for witnesses often disappoint a leader who has opened his case strongly. The junior counsel for the plaintiff then calls the first witness, who is generally the plaintiff himself, and examines him "in chief," as it is called. The witness is cross-examined by the defendant's counsel, and re-examined by the leading counsel for the plaintiff, who then calls the next witness. And so the case proceeds, the two counsel taking the witnesses for the plaintiff, as a rule, alternately. When all the plaintiff's witnesses have been examined, and all documents material to his case have been put in and read, the plaintiff's case is closed. The leading counsel for the defendant then states, if such be the fact, that he does not intend to call any witnesses, and in that event the plaintiff's counsel must at once address the jury, summing up his own evidence, and commenting on the defence, so far as it has been foreshadowed by the cross-examination, and also, no doubt, on the fact that the defendant does not venture to go into the box. The defendant's counsel then addresses the jury, criticising the evidence for the plaintiff. If, however, the defendant's counsel intends to call witnesses,

4,169/ 0s 8d under the said contract of January 19th, 1910, for "extras" within the meaning of the said contract, then the defendants say that the same are not "extras," but were included and paid for in the said fixed sum of 2,790/ The following clauses of the said contract are in that case also material

[Set out the clauses on which the defendants rely]

6 No instructions were ever given in writing by the engineer or any other person duly authorised on behalf of the defendants for any of the work, labour, or materials, the price of which is sought to be recovered in this action No such instructions in writing stated that any such matter was to be the subject of an extra or varied charge No claim was made in writing by the plaintiffs in respect of any such work within one week from the execution thereof, or before the same became out of view or beyond check or admeasurement

7. The plaintiffs did not deliver from time to time within one week after the expiration of the month in which the work then claimed for was done, a true or proper or any claim in a form prescribed by the engineer, or in any other form The engineer has not certified or recommended the amount claimed in this action or any other amount to be paid to the plaintiffs by the defendants No dispute has yet been referred to or settled by the engineer, nor has he ever given any decision thereon

No 79

GOODS SOLD AND DELIVERED

✓ *(Separate Defence of one of two Defendants)*

DEFENCE OF THE DEFENDANT C. D

1. This defendant never bought any goods from the plaintiff.
- 2 No goods were ever delivered by the plaintiff to this defendant at his request, or at all
3. This defendant never agreed to pay the plaintiff any of the prices charged in the particulars or any other prices
- 4 The prices charged by the plaintiff for the said goods are unreasonable and exorbitant

partizan must be kept in check; and yet such management must not be obvious. It is a great art to cross-examine well: it requires even greater art to examine in chief with uniform success, to bring out clearly and in proper chronological order just so much as is wanted and no more. Nothing will induce some witnesses to swear up to their proofs; from forgetfulness or some other reason they omit the most material circumstance, and supply in its place a host of immaterial details. And yet counsel must not seem to suggest anything to the witness.

Then objections are frequently taken either to questions put by counsel or to something which the witness is endeavouring to say. An objection to the admissibility of any evidence must be taken as soon as it is tendered; no objection can be raised after the evidence has once been received. Such an objection is usually stated in the compendious form, "That is not evidence." This may mean one or other of two very different things: either (a) that the fact sought to be proved is irrelevant to every issue in the action, or (b) that the proposed method is not the proper method of proving a relevant fact. Anything that goes to prove a material fact is relevant; everything else will be rigorously excluded. And relevant facts must be proved in the legitimate way; a fact may be most material, still that is no reason why you should be allowed to prove it by hearsay evidence. Counsel examining in chief must keep rigidly to what is relevant, and be prepared to prove all relevant facts by admissible evidence.

And he must not ask leading questions. A leading question is one which suggests to the witness the answer which it is desired he should give to it. Counsel may not, therefore, put such a question to his own witness, unless it is merely introductory, or relates to matters as to which there is no dispute. In most cases, however, it is necessary to prove a certain number of uncontested facts, in order that judge and jury may

or if he has already put in any document, he addresses the jury at the conclusion of the plaintiff's case, opening the defence. He then calls his witnesses, each of whom may be examined, cross-examined, and re-examined, and he usually makes a second speech for the defendant, at the conclusion of which the leading counsel for the plaintiff replies on the whole case. This disadvantage necessarily attends calling witnesses for the defendant; it gives the plaintiff the last word with the jury, and in a doubtful case the reply of an able advocate frequently determines the result of the action. But, on the other hand, the jury like to see the defendant in the box, and to learn from his own lips his reasons for his conduct. If there are two defendants, of whom one calls evidence material to the defence of both, and the other calls no evidence at all, the latter has apparently a right of reply after the plaintiff's counsel has addressed the jury (*Ryland v Jackson and Brodie*, 18 Times L. R. 574, *Medley v London United Trams*, 26 Times L. R. 315). When the speeches of counsel are happily over, the learned judge sums up the whole case to the jury, and then follow verdict and judgment.

Examination of Witnesses in Chief

The witnesses now are always examined *vivâ voce* and in open Court, unless all parties have agreed in writing, or a Master has for sufficient reason ordered, that their evidence shall be taken on affidavit. (Order XXXVII. r. 1.) Any witness who has been subpoenaed to attend the trial may refuse to give any evidence unless he is first paid his proper expenses for attending. This is so even though the witness has been sworn (*In re Working Men's Mutual Society*, 21 Ch. D. 831.)

The success of a case depends largely on how the witnesses are handled. The timid witness must be encouraged, the talkative witness repressed, the witness who is too strong a

No 80

GOODS SOLD AND DELIVERED—INFERIOR QUALITY

1 The plaintiffs never delivered to the defendant any hides of the quality and substance ordered

2 The plaintiffs tendered to the defendant other hides of a much lighter and inferior quality, these the defendant refused to accept, and returned the same to the plaintiffs

3 The defendant has already paid to the plaintiffs' solicitor the sum of 27*l* in pursuance of an order made by Master — under Order XIV. The defendant, while denying all liability to the plaintiffs, now appropriates this sum towards the payment of the first item indorsed on the plaintiffs' writ, he brings into Court the further sum of 23*l*, and says that these two sums, taken together, are sufficient to satisfy the plaintiffs' claim in respect of that item

No 81

GOODS SOLD AND DELIVERED—ACCOUNT STATED—SET-OFF

1 The defendant admits that the goods mentioned in the plaintiff's particulars were sold and delivered to him, and that on April 4th, 1911, he owed the plaintiff the full amount claimed on the writ (69*l* 4*s* 8*d*) in respect of them

2 Prior to that date, the defendant had sold and delivered to the plaintiff certain goods (of which the following are the particulars), and the plaintiff owed the defendant the sum of 37*l* 18*s* 3*d* in respect of these goods

Particulars

								£	s.	d.
1909—March 31st—31 loaves	-	-	-	-	-	-	-	0	7	9
„ April 30th—30 „	-	-	-	-	-	-	-	0	7	6
&c &c	-	-	-	-	-	-	-			
								<hr/>		
								£37	18	3

3 On April 4th, 1911, the plaintiff and defendant met at the plaintiff's house and agreed the figures on either side, and stated an account between them. And it was then found that there was a balance of 31*l* 6*s* 5*d*. due from the defendant to the plaintiff, which amount the defendant then and there paid to the plaintiff,

when in the box, by looking at any entry or memorandum which he himself wrote or dictated very shortly after the event which it records, or even at an entry made by some one else, but which he saw and read and approved as correct very shortly after the event. It does not matter that the document is not evidence for either party, or even that it should be and is not stamped (*Maugham v. Hubbard*, 8 B. & C. 14, *Burchall v. Bullough*, (1896) 1 Q. B. 325.) The witness should not read it aloud to the jury (unless the other side consent) he should merely refer to it to refresh his memory. And he must have in Court the original entry, and not a fair copy of it. (*Burton v. Plummer*, 2 A. & E. 343.) Counsel on the other side is entitled to look at any document by which the witness has refreshed his memory and to cross-examine him on it, and he may, if he thinks fit, put it in evidence.

Cross-examination.

Counsel, when cross-examining, has a much freer hand than when examining in chief. He may ask leading questions to his heart's content. And he need not confine his questions to the facts in issue; he may branch out into many collateral matters; he may attack the character and impugn the credit of the witness to any extent which his instructions justify. But he should use this liberty guardedly.

This much counsel is bound to do, when cross-examining he must put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the

understand the position of the parties and the circumstances surrounding the case. As to these matters, leading questions are often put with the permission of counsel on the other side. Leading questions may also be put to contradict evidence already given by a witness on the other side; *e g*, if the plaintiff has sworn that the defendant said, "The goods need not all be equal to sample," the defendant can, and should, be asked, "Did you ever say to the plaintiff that the goods need not all be equal to sample, or any words to that effect?"

A party may not attack the character of a witness whom he has called himself, or call evidence to contradict him, except where he was compelled by the law to call that particular witness, *e g*, if he were the attesting witness to a will. For by voluntarily placing him before the Court to give evidence the party represents to the judge and jury that the witness is worthy of belief. Sometimes, however, the judge will allow an adverse witness to be treated as hostile, that is, to be treated as though he had been called by the other side, and then he may be cross-examined and contradicted. He may be asked leading questions; he can also be asked as to any previous statement made by him (such as a signed proof of his evidence), and after his attention has been called to the particular portions which are inconsistent with his present evidence, such statement, if in writing, may be put in evidence to contradict him. (C. L. P. Act, 1854 (17 & 18 Vict. c. 125), ss. 23, 24) But the judge will not allow counsel to treat a witness as hostile merely because the evidence he is giving is unfavourable to the party who called him. Such permission will only be given where the witness shows a decided bias against that party, and a reluctance to state anything that tells in his favour. (*Greenough v. Eccles*, 5 C. B. N. S. 786.)

A witness should always state what happened according to his own personal recollection, and not according to what he has since been told. But he is allowed to refresh his memory,

defendant's version will be. If he ask no question as to it, he will be taken to accept the plaintiff's account in its entirety

But in all other matters it is often safer to ask too little than too much. It is quite unnecessary to take the witness through the whole of the story which he has already given in chief the usual result of doing so is that the witness merely repeats his former evidence with greater emphasis and clearness and brings out many minor incidents and considerations which corroborate his tale.

Moreover, reckless cross-examination often lets in awkward pieces of evidence which hitherto were not admissible. Thus, if you ask a witness whether he did not meet Mr. X. at Ilminster Fair last September, and whether Mr. X. did not then tell him so and so, your opponent, in reply, will be able to ask the witness what Mr. X. really did say to him on that occasion, although this was not admissible in chief, because your client was not present at the conversation. Again, if one entry in a book is tendered in evidence or is used by a witness to refresh his memory, and you take the book and turn over the leaves and cross-examine as to other entries which you find there, you make such other entries evidence, and part of your case (*Gregory v. Tavernor*, 6 C & P. at p. 281.)

Witnesses may be cross-examined not only as to the facts of the case but also "to credit," that is, as to matters not material to the issue, with the view of impugning their credit and thus shaking their whole testimony. But, in order to prevent the case from thus branching out into all manner of irrelevant issues, it is wisely provided that on such matters the answer of the witness must be accepted as final, no evidence can be called to contradict it. There is an important exception. A witness can always be asked whether he has not been convicted of a crime, and if he either denies the fact, or refuses to answer, the opposite party may prove * such conviction, however irrele-

* The right method of proving a conviction is stated *ante*, p. 301.

vant to the issue the fact of such conviction may be. (28 Vict. c. 18, s. 6.)

If the witness has made in chief a statement material to the issue which is inconsistent with a former statement made by him in writing, the latter statement may be used to contradict him. But before this can be done he must be asked in cross-examination whether he has not made such a statement, and his attention must be called to the circumstance under which it was made. Should he still deny that he ever made such a statement the original must be shown to him, and his attention called to those parts of it which are to be used for the purpose of contradicting him. (28 Vict. c. 18, s. 5.)

There are some questions, moreover, which a witness will not be compelled to answer, either in cross-examination or in chief:—

- (i.) He may refuse to answer any question which tends, directly or indirectly, to show that he has committed a crime, even though there is not in reality the faintest prospect of any criminal proceedings being taken against him.
- (ii.) No witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, is bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (32 & 33 Vict. c. 68, s. 3), as explained in *Evans v. Evans* (No. 2), (1904) P. 378.
- (iii.) Neither husband nor wife can be compelled at any time to disclose communications which have passed between them during their married life. (16 & 17 Vict. c. 83, s. 3.)
- (iv.) No barrister or solicitor may, unless his client consents, disclose any fact which his client communi-

cated to him in his professional capacity, or the professional advice he gave his client—nor can the client be compelled to make any such disclosure—so long as such communication was not made, nor such advice given, in furtherance of any criminal or fraudulent purpose. (*Williams v Quebrada*, (1895) 2 Ch. 751)

(v) No judge, and no juryman, can be compelled to give evidence as to anything which came to his knowledge in such capacity. No member of the Privy Council may disclose what occurred in the Council. No member of either House of Parliament can be compelled to state what took place in the House, without the leave of the House. No servant of the State can be compelled to disclose any official communication made to him by any other State official, whether superior or inferior, unless the head of his department permits him so to do.

Re-examination

The object of re-examination is merely to give the witness an opportunity of explaining any seeming inconsistency in his answers, and of stating the whole truth as to any matter which was touched on, but not fully dealt with, in cross-examination. Counsel, when re-examining, can ask no question that does not arise out of the cross-examination, except by consent; he has no more right to ask his own witness leading questions at this stage than at any other; and it is a mere waste of time to ask over again questions already put in chief.

When counsel have finished with the witness, the judge often asks him a few questions. Neither counsel has any right to re-examine the witness on the answers which he has given to the judge; but he may ask the judge to put another question to the witness to make those answers clear. After a witness

has once left the box, he cannot be recalled, except by the leave of the judge, and counsel, when asking leave, is expected to indicate the matters on which he desires him to give further evidence. If the judge consents, and the witness is recalled, the counsel recalling him will be confined to the matters so indicated, but his opponent may, apparently, cross-examine him on any subject. But the judge has no power to call and examine a witness who has not been called by either party, unless both parties consent or acquiesce in his doing so. (*In re Enoch and Zaretsky, Bock & Co's Arbitration*, (1910) 1 K B 327) If he does so, neither party has a right to cross-examine that witness without the leave of the judge. But such leave will always be granted if the evidence of the witness called by the judge is adverse to either party. (*Coulson v. Disborough*, (1894) 2 Q B 316)

Documents

The original document itself must be produced at the trial, if it be possible to obtain it. And if the plaintiff puts it in, the defendant is entitled to have the whole of it read as part of the plaintiff's case. If the original be not produced, it must be satisfactorily accounted for, and its loss or destruction clearly proved. But where a large number of copies are printed from the same type, or lithographed at the same time by the same process, none of them are copies in the legal sense of the word. They are all counterpart originals, and each is primary evidence of the contents of the rest.

If a person is only called to produce a document, and is not sworn or asked any question in chief, the other side has no right to cross-examine him, sometimes he is called on to produce a document while some other witness is in the box, and is himself called as a witness at a later period of the case. A party who has been served with notice to produce is not bound to comply with it, when the other side calls for a document, his counsel may say, "I do not produce it." Counsel

must not say more, for he is not entitled to give evidence, his witnesses must subsequently explain why it is not produced, *e g*, that it has been lost or destroyed.

If the original be produced, a dispute may arise as to who wrote it; and it may be necessary to call witnesses to prove the handwriting. Anyone who has ever seen A. write (even though only once) can be called to prove his handwriting. So can anyone who has corresponded with A., or seen letters which have arrived in answer to letters addressed to A. Thus, a clerk in a merchant's office, who has corresponded with A. on his master's behalf, may be called to prove his handwriting, though he has never seen A. write (Cf *R. v Turner*, (1910) 1 K B at pp 357, 358.) The usual course is for the counsel who tenders the document merely to ask the witness, "Do you know Mr A's handwriting?" leaving it to his opponent to cross-examine as to the extent of the witness's acquaintance. Such cross-examination will only weaken the force of his evidence, not destroy its admissibility. Lastly, by sect. 27 of the Common Law Procedure Act, 1854, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." It may be necessary to call some expert in handwriting. But the jury generally receive the evidence of experts with caution, so it is well to back it up with evidence of witnesses who have seen the person write. If the suggestion is that the document was written by either party to the suit, and he is present in Court, he may, it seems, be then and there required to write something which the Court and jury may compare with the document in dispute (*Doe d Devine v. Wilson*, 10 Moo P C. at p 530.)

Sometimes, however, when a document is tendered in evi-

dence, the officer of the Court takes the objection that it ought to be, and is not, stamped. Counsel never take a stamp objection. Some documents, such as most bills of exchange and promissory notes, cannot be stamped after they are issued; and in such cases the objection is fatal; no copy can be put in, even by consent, after it is known to the Court that the original is unstamped. If, however, the document is one which can by law be stamped after its issue or execution, the objection can be removed by paying the officer the amount of the stamp duty and a penalty; or, if the document be insufficiently stamped, the amount of the deficiency and a penalty. If there is any question as to the necessity for a stamp, or as to its proper amount, the judge decides it then and there, if he admits the document, his decision is final, and no new trial will be granted, if he subsequently proves to have been wrong. (Order XXXIX. r. 8.)

Sometimes a graver difficulty is experienced in putting in evidence some official document, *e g*, a letter or memorial sent to a Secretary of State or to some government department. An objection is often taken that the production of such documents is against public policy. If this objection is duly raised by the proper officer, whether he be a party to the action or not, the document cannot be read, nor can any other evidence be given of its contents. If the original is privileged from production on the ground of public policy, the same public policy requires that no secondary evidence of it shall be given. (*Home v. Bentinck*, 2 Brod & B 130, *Dawkins v. Lord Rokeby*, L. R. 8 Q B 255.) The objection must be taken by the head of the public department of State, who is alone able to judge whether the production of the document will or will not be injurious to the public service, it is not for the judge at the trial to decide that question. (*Beatson v Skene*, 5 H. & N. 838; *Kain v. Farrer*, 37 L. T. at p. 470.) But as a rule the judge does not trouble the head of the department to attend

in Court in person, provided a representative from the office attends on his behalf and satisfies the judge that the mind of the responsible head of the department has been brought to bear on the question, and that he has decided that the production of the document would be injurious to the public service (See *In re Joseph Hargreaves, Ltd*, (1900) 1 Ch 347.)

Secondary Evidence

If the original document has been lost or destroyed, secondary evidence may be given of its contents. But its loss or destruction must first be clearly proved. It is not enough for a witness to say it is lost; he must prove that he has made a real search for it, before he will be allowed to put in a copy or state his recollection of its contents. If he seeks to put in a copy, he must prove that it is a correct copy. Strictly, the man who made that copy should be called to prove its correctness. But counsel will generally consent to a copy of any letter being read when it is common ground that such a letter was in fact written and received. Where words are written, or a paper placarded, on a wall, which cannot conveniently be brought into Court, secondary evidence may be given of its contents (*Per* Lord Abinger in *Mortimer v. M'Callan*, 6 M. & W. at p. 68, *Bruce v. Nicolopulo*, 11 Ex. at p. 133; 24 L. J. Ex at p. 324)

Where, however, the document is still in existence and capable of being brought into Court, the party desiring to give secondary evidence of its contents must, in the first place, prove that he has done all in his power to obtain the original document. Thus, the plaintiff is entitled to give secondary evidence, if the original is in the defendant's possession, and is not produced when called for, provided due notice to produce it was served on the defendant's solicitor a reasonable time before the trial; and also if the document is in the pos-

session of someone beyond the jurisdiction of the Court, who refuses to produce it on request, although informed of the purpose for which it is required. If it be in the possession of a third person within jurisdiction, but a stranger to the cause, who refuses to produce it, although duly served with a *subpœna duces tecum* for the purpose, then the right to give secondary evidence of its contents appears to depend on whether such refusal be rightful or wrongful. If it be a *wrongful* refusal, then, it is said, the remedy of the party is against the witness only (*R v Llanfaethly*, 2 E. & B. 940, *sed quære*.) If it be a *rightful* refusal, then secondary evidence is, as a rule, admitted, as the party has done all in his power to produce primary proof. Even here, however, the privilege arising from considerations of public policy may prevent *any* evidence being given of the contents of the document. But where the privilege is only of a private character, secondary evidence may be given of the contents of documents privileged from production, *e g*, of a document entrusted to a solicitor by his client (*Calcraft v Guest*, (1898) 1 Q. B. 759.)

Rebutting Evidence

In some cases, at the close of the defendant's case, the plaintiff is allowed to call further evidence in answer to any affirmative case raised by the defendant. Thus if the defendant has pleaded an excuse or justification for his conduct, the plaintiff's counsel may, if he chooses, deal with this defence and call evidence to rebut the justification in the first instance, or, if he prefers, he may confine his original case to proving what the defendant did, and deal with the defence in his reply, when he will know the strength of the defendant's case. But the plaintiff's counsel cannot, in the absence of special circumstances, call some evidence to rebut the justification in the first instance, and more afterwards in reply, thus dividing his proof (*Browne v Murray*, Ry & Moo. 254)

Nonsuit.

trictly, there is no longer such a thing as a nonsuit. (*For the Star Newspaper Co.*, (1900) A. C. 19.) But the word is used to denote the act of the judge when he withdraws case from the jury and directs judgment to be entered for the defendant without (or in spite of) their verdict. The proper time for the defendant's counsel to submit to the judge that there is no case for him to answer is at the close of plaintiff's case. Some judges, however, decline to allow question to be argued at this stage of the action, unless defendant's counsel at once announces that he intends to call witnesses. And indeed it is generally best to discuss the merits of the case after all the evidence has been given. A plaintiff should not be non-suited on his counsel's opening except by the consent of his counsel. (*Fletcher v. L. & N. W. Ry.* (1892) 1 Q. B. 122.) Every point of law on which either party intends to rely must, as a rule, be raised before verdict; if it is not raised when it ought to have been raised, the party is deemed to have waived it. (*Graham v. Mayor, &c. of Bedford*, 12 Times L. R. 36; and see *post*, p. 330.) The judge at the trial has full power to allow either party to amend the indorsement on his writ or any pleading or proceeding on such terms as may be just (Order XXVIII. rr. 1, 2), and to add, or strike out, or substitute, a plaintiff or defendant. (Order XVI. r. 12.)

Withdrawing a Juror.

Decisions are frequently compromised before the judge comes up with the evidence. A juror is often withdrawn, sometimes at the suggestion of the judge. This means that neither party cares for the case to proceed. If no special terms are made on, the effect of withdrawing a juror is that the action is at an end, that no fresh action can be brought for the same

cause of action, and that each party pays his own costs (See *Strauss v Francis*, 4 F. & F 939, 1107, *Moscatti v Lawson*, 7 C & P. 35, n ; *Norburn v. Hilliam*, L. R 5 C P 129) If any other terms be agreed on, they should be indorsed on counsel's briefs and each indorsement signed by the leading counsel on both sides Counsel has full authority to make such a compromise, unless expressly forbidden to do so by his client at the time (*Strauss v Francis*, L. R. 1 Q. B 379, *Matthews v. Munster*, 20 Q. B. D. 141, *Neale v Gordon Lennox*, (1902) A. C 465, *Little v. Spreadbury*, (1910) 2 K. B. 658), provided the compromise does not include or affect matters outside the scope of the action. (*Kempshall v. Holland*, 14 R. 336.) The terms of such a compromise will be strictly enforced, if necessary, by an order of the Court. (*Tardrew v. Brook*, 5 B. & Ad 880, *Riley v. Byrne*, *Ib.* 882, n But see *Lewis's v. Lewis*, 45 Ch D 281.)

Verdict.

If, however, the progress of the trial is not arrested by either a nonsuit or a compromise, then, as soon as all the evidence has been heard, and the counsel on both sides have addressed the jury, the judge sums up the evidence. He may either leave the jury to return a general verdict for the plaintiff or for the defendant, or ask them to answer certain questions, in the latter case it will be for the judge to determine subsequently what is the legal result of their findings. If either party desires that any other question should be left to the jury besides those which the judge is proposing to leave, he should ask the judge to put that question also to the jury before the verdict is given (*Weiser v. Segar*, (1904) W. N. 93.)

The jury now consider their verdict. They must determine all issues of fact, and, if they are in favour of the plaintiff, they must also assess the damages. In arriving at the

amount, the jury must not have regard to any question of costs; that is a matter for the judge. And they must not be informed that any money has been paid into Court. In some cases the amount to which the plaintiff is entitled can be ascertained by mere arithmetic, or calculated according to a scale of charges or some other accepted rate or percentage. The damages are then said to be *liquidated* or "made clear." When, however, the amount to be recovered depends on all the circumstances of the case, and on the conduct of the parties, or is fixed by opinion or by an estimate, the damages are said to be *unliquidated*. Thus, in an action on a bill of exchange or a promissory note, the amount of the verdict, if it be for the plaintiff at all, can be reckoned beforehand so much for principal, so much for interest, so much for notarial expenses. But in an action of libel, for instance, it is open to the jury to award the plaintiff a farthing, or forty shillings, or a hundred pounds, and no one can say beforehand what the precise figure will be. Where the damages are unliquidated, the sum which the jury awards to a successful plaintiff may be either—

- (i.) Contemptuous,
- (ii.) Nominal,
- (iii.) Substantial; or
- (iv.) Vindictive.

(1) Contemptuous damages are awarded when the jury consider that the action should never have been brought. The defendant may have just overstepped the line, but the plaintiff is also somewhat to blame in the matter, or has rushed into litigation unnecessarily; so he only recovers a farthing or a shilling.

(ii) Nominal damages are awarded where the action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his

pocket, he has established his right or cleared his character, and is content to accept forty shillings and his costs

(iii) Substantial damages are awarded where the jury seriously endeavour, as men of business, to arrive at a figure which will fairly compensate the plaintiff for the injury which he has in fact sustained.

(iv) Vindictive or exemplary damages are awarded where the jury desire to mark their sense of the defendant's conduct by fining him to a certain extent; they therefore punish him by awarding the plaintiff damages in excess of the amount which would be adequate compensation for the loss or injury which he has actually sustained. The jury are only allowed to give such damages in actions for breach of promise of marriage, assault, trespass, seduction, libel, slander, false imprisonment, and malicious prosecution

Where the cause of action is continuing (as in cases of nuisance, non-repair, or continuing trespass) the jury must assess the damages down to the time of assessment, and the plaintiff can bring a second action for any subsequent damage, if it continues. But where the cause of action consists of one isolated act or omission (e g, one assault, one libel, or one piece of negligence), the jury must assess the damages once for all. No fresh action can as a rule be brought for any subsequent damage, hence, the jury must now take into their consideration every loss which will naturally result in the future from the defendant's conduct, though they must not speculate on mere contingencies *

* There is one exception to this rule. In cases where special damage is essential to the cause of action, it has been held that a second action can be brought, if fresh special damage arises from the same cause of action after the writ in the first action was issued see *ante*, p 222. Hence, in such actions, the jury should confine their attention to the special damage which has actually happened and which is alleged and proved before them, and leave the future for some other jury to deal with.

and the plaintiff accepted the payment of such balance in satisfaction and discharge of his present claim

4 In the alternative, as to 31*l* 6*s* 5*d*, part of the plaintiff's claim in this action, the defendant says that before action, to wit, on April 4th, 1911, he satisfied and discharged the plaintiff's claim by payment

5 As to 37*l* 18*s* 3*d*, the residue of the plaintiff's claim in this action, the defendant says that the plaintiff at the commencement of this action was and still is indebted to the defendant to the amount of 37*l* 18*s* 3*d* for goods sold and delivered, full particulars of which are stated in paragraph 2 above, which amount the defendant is willing to set-off against so much of the plaintiff's claim as is herein pleaded to

No 82

✓ GOODS SOLD AND DELIVERED—NOT EQUAL TO SAMPLE

(*Defence and Counterclaim to No 52*)

1 As to 44*l*, part of the moneys claimed in this action, being the price of forty-four sacks of the barley mentioned in paragraph 3 of the Statement of Claim, the defendants have since action paid 44*l* to the plaintiff's solicitors under an order made in this action on February 22nd, 1911

2 As to the residue of the plaintiff's claim in this action, the defendants say the said barley was sold to them by sample and the plaintiff warranted and undertook that the same was equal to sample, and was and should be properly screened and well managed

3. The said barley was not equal to sample, and was not properly screened or well managed, and thereby was and is of less value to the defendants.

4 The defendants bring into Court ———*l.*, and say that, by reason of the matters hereinbefore alleged, and after deducting the amount of the defendant's counterclaim, the same is sufficient to satisfy so much of the plaintiff's claim as is herein pleaded to

5 And by way of set-off and counterclaim, the defendants repeat the allegations contained in paragraphs 2, 3, and 4, above, and claim alternatively ———*l* damages for the plaintiff's breaches of warranty.

[See Precedent No 109]

of his costs. If any money has been paid into Court, and is still in Court, it will be "paid out to the plaintiff on his request, unless the Court or a judge shall otherwise order" (Order XXII r 5 (b).) If the defendant is entitled to any costs, his counsel may apply to the judge for an order that such money remain in Court until after taxation as security for his costs. If the jury has assessed the plaintiff's damages at a figure less than the amount paid into Court, the judge will give judgment for the defendant, and he may, if he think fit, order the difference to be paid out to the defendant (*Gray v. Bartholomew*, (1895) 1 Q. B. 209), except where the defendant has paid money into Court with a plea under Lord Campbell's Libel Act and has failed to prove the rest of the plea (*Dunn v. Devon, &c. Newspaper Co.*, (1895) 1 Q. B. 211, n ; *Oxley v. Wilkes*, (1898) 2 Q. B. 56.) Counsel for the unsuccessful party, if he thinks of appealing, should also, at this stage, ask for a stay of execution, which is generally granted, if at all, on the terms that he must bring a sum of money into Court and give notice of appeal within so many days.

A judgment finally disposes of all controversy as to any of the matters in issue in the action. The rights of the parties as to any such matter depend in future wholly on the judgment. As long as that judgment stands, none of the issues raised in the action can be re-tried. The original cause of action is gone—*transit in rem judicatam*—it is merged in the judgment debt. This result is peculiar to a judgment. a mere stay of proceedings, or the acceptance of money paid into Court, has not the same effect (*Coote v. Ford*, (1899) 2 Ch. 93.)

Judgment.

As soon as the verdict, be it general or special, has been returned, it is the duty of the counsel for the successful party to ask for judgment. Sometimes, if there are important legal questions raised, the judge does not give judgment at once, but reserves the matter for "further consideration," as it is called. This is really a motion for judgment, and it must be heard and determined, if possible, by the judge who tried the case (Jud. Act, 1890, s. 2.) As a rule, however, the judge gives judgment then and there, according to the findings of the jury. Where distinct issues are separately left to the jury, the judge may accept their verdict on those issues on which they agree, and discharge them on others on which they cannot agree (*Marsh v. Isaacs*, 45 L. J. C. P. 505, and see *Nevill v. Fine Arts Insurance Co.*, (1895) 2 Q. B. at p. 158.) In either case the judgment must be entered within fourteen days (Order LXII. 1. 14A.)

But the duties of counsel are not yet over. Now is the time to ask for any special costs, such as the costs of a special jury, of a commission to take evidence abroad, of photographic copies of any document, or any costs reserved to be disposed of at the trial (*British Provident Association v. Bywater*, (1897) 2 Ch. 531, *How v. Winterton*, 91 L. T. 763.) The party who has incurred these costs will have to bear them, unless, before judgment is entered, he obtains an order for their allowance on taxation. If the case was tried by judge alone, the counsel for the successful party must also ask for the general costs of the action. If it was tried by a judge with a jury, he must consider whether any special order or certificate from the judge is necessary to entitle him to such costs. (See *post*, pp. 350, 355, 358.) If the judgment carries costs as it stands, he should say nothing, and leave it to his opponent to try and discover some "good cause" for depriving the successful party

CHAPTER XX

APPEALS

EVERY motion for a new trial, or to set aside a verdict, finding, or judgment, is heard and determined by the Court of Appeal,* which can now sit in three divisions (2 Edw. VII c. 31). Any party who is dissatisfied with the verdict of the jury or with the finding of the judge on any issue of fact, may apply for a new trial, or to have the judgment entered set aside and some other judgment entered instead; or, if he is satisfied with the finding of the jury upon the questions submitted to them, he may complain that other questions ought to have been left to them, or that their verdict has not been properly entered, or that, upon their findings, the judg-

* There is one exception. A motion to set aside the judgment of a referee, or to review his findings, or for a new trial of an action tried by a referee must still be made to a Divisional Court, and not to the Court of Appeal. (Order XL r 6; *Forrest v Todd*, 76 L. T. 500, *Wynne-Finch v. Chaytor*, (1903) 2 Ch. 475.) The word "referee" includes a Master to whom an action is referred by consent under Order XIV. r 7 (*Fraser v. Fraser*, (1905) 1 K. B. 368.) The notice of motion must be given within the time prescribed by Order XXXIX. r 4. But an application for a new trial after damages have been assessed by a jury before an undersheriff must be made to the Court of Appeal. (*Radam, & Co., Ltd. v. Leather*, (1892) 1 Q. B. 85.) Appeals from all inferior Courts are still heard by a Divisional Court (Jud. Act, 1873, s. 45, Jud. Act, 1894, s. 1, sub-s (5); *Darlow v. Shuttleworth*, (1902) 1 K. B. 721), except appeals on questions of law under the Agricultural Holdings Act, 1908, and under Schedule II. of the Workmen's Compensation Act, 1906 (Order LVIII. 1. 20), and appeals from the Liverpool Court of Passage (*Anderson v. Dean*, (1894) 2 Q. B. 222, *Coates v. Moore*, (1903) 2 K. B. 140), all of which go direct to the Court of Appeal.

ment entered is wrong In any case his application must be either for a new trial or for judgment He generally asks for both But whatever the terms of his notice of motion may be, the Court of Appeal can always, if it thinks fit, either grant a new trial, or order judgment to be entered as justice may require. (Order XXXIX. r 1A, Order LVIII r. 5, *Allcock v Hall*, (1891) 1 Q B 444, *Ibo Syndicate, Ltd v Wyler*, 51 W R 320, 87 L T 83.)

The Court of Appeal has, over any action or matter brought before it on appeal, all the powers, authority and jurisdiction of the High Court (Jud Act, 1873, s 19) It can order the appellant to give security for the costs of the appeal. (*Wightwick v. Pope*, (1902) 2 K B 99.) It can amend the pleadings, enlarge time, receive fresh evidence, draw inferences of fact (Order LVIII. r 4, Order XXXIX r 1A), direct issues to be tried, or accounts and inquiries to be taken or made (Order XL r 10), and generally it has power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require (Order LVIII r 4) If there was any miscarriage of justice at the trial below, the Court of Appeal may grant a new trial as to so much of the matter as the miscarriage affects, without interfering with the decision on any other question (Order XXXIX r 7, *Marsh v. Isaacs*, 45 L. J. C P 505) So, too, the Court may grant a new trial as against one defendant without granting it as to all, though the notice of motion must, as a rule, be served on all defendants.

Notice of Motion

Every appeal from a final judgment or order, except by consent of all parties, must be heard by not less than three judges of the Court of Appeal (Jud Act, 1875, s. 12; 1899, s. 1.) The application is by motion, of which due notice must

be given to all parties directly affected by the appeal fourteen days at least before the application is made to the Court. If the action was tried by a jury and the notice of motion asks for a new trial, it must be served within ten days after the trial, or further consideration (Order XXXIX r 4, *Karno v. Spratt*, (1909) W N 251) If the action was tried by a jury, but the notice of motion does not ask for a new trial, or if the action was tried without a jury, it must be served within three months from the time when judgment in the action is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal (Order LVIII r 15) Vacation time is not reckoned in computing the time for serving the notice of motion. (Order XXXIX r 4) The Court may direct that the motion be served on other persons who have not been served by the appellant (Order LVIII r 2) Any party served with notice of an appeal is *prima facie* entitled to attend the hearing, and, if the appeal fails, to be paid his costs, but not where his attendance is obviously unnecessary and useless (*Ex parte Webster*, 22 Ch D 136, *In re New Callao*, *Ib* 484)

The notice must state the grounds of the application, and whether all or part only of the findings is complained of (Order XXXIX. r 3) It is not enough for the appellant merely to say that he complains of "misdirection", the notice must state how and in what manner the jury were misdirected (*Pfeiffer v Midland Ry. Co* , 18 Q. B. D. 243, *Murfett v Smith*, 12 P D 116) If a respondent desires to contend on the hearing of the appeal that the decision of the Court below should be varied, he should, before the hearing, give notice of his intention to the appellant, if he does not, the Court may adjourn the appeal or make a special order as to costs (Order LVIII. rr. 6, 7.)

Questions of Law and of Fact.

An appeal on a matter of law has, as a rule, a greater chance of success than an appeal on any question of fact. If matters of fact only are involved, the judges of the Court of Appeal are naturally very reluctant to disturb the finding of the judge or jury below, who saw the witnesses, and had the opportunity of judging of their demeanour in the box. Where the action was tried by a judge without a jury, the Court of Appeal will start with the presumption that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, the decision will be reversed, if the matter is left in doubt, the Court of Appeal will not alter the decision of the Court below. (*Colonial Securities Trust Co. v. Massey*, (1896) 1 Q. B. 38; *Coghlan v Cumberland*, (1898) 1 Ch. 704.) And where the action was tried by a judge with a jury, it is still more difficult to disturb an adverse finding of fact. If there was any evidence to go to the jury on that issue, the Court will not, as a rule, set aside the finding, unless it be such as twelve reasonable men could not honestly have found on the evidence before them. Where there is conflicting testimony, it is for the jury, not the Court, to decide (*Metropolitan Ry. Co. v Wright*, 11 App. Cas. 152; *Spencer v. Jones*, 13 Times L. R. 174; *Jones v Spencer*, 77 L. T. 536.) Hence it is generally safer to rely on a point of law. But it must be a point of law which was raised at the trial below, unless the appellant was taken by surprise or there are other special circumstances which excuse the omission. (*Clouston v Corry*, (1906) A. C. 122, *Norwich Corporation v. Norwich Tramways*, (1906) 2 K. B. 119.) If either party at the trial deliberately elects to fight one question only, on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the

pleadings and on the evidence (*Martin v Gt N. Ry Co*, 16 C B 179, *Browne v Dunn*, 6 R 67; *Gloucester Union v Gloucester Industrial Society*, 5 L. G. R. 493) But it is the duty of every Court to prevent any abuse of its process; hence the Court may at any stage of the proceeding raise of its own motion the question of the illegality of the contract sued on, although the point had not been raised in the argument before it (*Connolly v Consumers' Cordage Co*, 89 L. T. 347, *Lockett v Wood*, 24 Times L R. 617) The judge's note is decisive as to the evidence taken in the Court below, but either party may read a shorthand writer's note to supplement, though not to overrule, the judge's note. (*Laming v Gee*, 28 W R. 217; 41 L T 744.) A copy should be made of every document that is really material for the use of each of the Lords Justices who hear the appeal.

New Trial

A motion for a new trial may be made on any of the following grounds —

- (i.) That the judge misdirected the jury,
- (ii) That the judge wrongly received or wrongly rejected evidence,
- (iii) That there was no evidence to go to the jury,
- (iv) That the verdict is against the weight of evidence;
- (v.) That fresh evidence has been newly discovered;
- (vi) Surprise;
- (vii.) That the jury misbehaved;
- (viii) That the damages are excessive or inadequate

(i.) and (ii.) A new trial will not be granted on the ground of misdirection, or improper admission or rejection of evidence, if the respondent can satisfy the Court that no substantial wrong or miscarriage has been thereby occasioned (Order XXXIX. r 6; *Anthony v. Halstead*, 37 L T. 433, *Bray v.*

Ford, (1896) A C 44, *Tait v. Beggs*, (1905) 2 Ir. R. 525)
 The Court will not grant a new trial if it is satisfied that the jury, if rightly directed, would still have returned the same verdict (Per Lord Esher, M R , in *Merwale v Carson*, 20 Q B D at p 281)

(iii) and (iv) That there was no evidence to go to the jury on a particular issue is an objection in point of law, it means that there was no evidence worthy of being considered by the jury, in the technical language of the Courts, there must be more than a mere *scintilla* of evidence On the other hand the objection that the verdict is against the weight of the evidence raises a question of fact The judge and jury below who saw the witnesses and heard them cross-examined are the best judges of the weight of their evidence It does not matter how many witnesses swore one way, and how few the other Where there is any evidence on both sides proper to be submitted to a jury, their verdict once found must stand. (*Commissioner for Railways v Brown*, 13 App Cas. 133.) In the absence of any misdirection, the Court will not interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence, unless the verdict was one which no reasonable men could have found (*Webster v Friedeberg*, 17 Q B D. 736, *Australian Newspaper Co , Limited v. Bennett*, (1894) A. C. 284; *Cox v. English, &c. Bank*, (1905) A C. 168.) "The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find." (Per Lord Herschell, L. C , in *Metropolitan Ry. Co. v Wright*, 11 App Cas. at p. 154.) "If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges" (Per Lord Halsbury, 11 App Cas at p. 156. But see the judgments of Lopes, L. J.,

in *Spencer v Jones*, 13 Times L. R. 174, and of the House of Lords in *Jones v Spencer*, 77 L. T. 536)

(v) A new trial will only be granted upon the ground that fresh evidence has been discovered, when it could not with reasonable diligence have been discovered before the trial, and further, when it is so conclusive as to make it practically certain that the verdict would have been different, if it had been adduced (*Phosphate Sewage Company v. Molleson*, 4 App Cas 801, *Young v Kershaw*, 81 L. T. 531, *Turnbull & Co v Duval*, (1902) A. C. 429)

(vi.) "Surprise" is the term used to cover cases in which either party has been prevented from having a fair trial through no fault of his own: *e g* , if the case be unexpectedly called on when he was reasonably absent; if his opponent misled him as to time or place of trial, or played any other fraudulent trick on him, if the case took a wholly unexpected turn which could not reasonably have been anticipated; or if a material witness was kept away by his opponent. Whenever a new trial is moved for on the ground of surprise, there must be an affidavit setting out the facts "Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit" (*Per Maule, J* , in *Hoare v. Silverlock* (No. 2), 9 C. B. 22.)

(vii) The misconduct of the jury or of an officer of the Court is ground for a new trial, if it really prevented either party having a fair trial. A new trial will not be granted merely on the ground that the jury expressed an opinion during the judge's summing-up inconsistent with their subsequent verdict (*Napier v. Daniel*, 3 Bing N. C. 77); nor on the ground that either judge or jury prematurely expressed a strong opinion as to the case either way (*Lloyd v. Jones*, 7 B. & S. 475)

It would be otherwise if a juror before being sworn had expressed a determination to give his verdict a certain way (*Ramadge v Ryan*, 9 Bing 333, *Allum v Boulton*, 9 Ex 738, 23 L J Ex. 208), or if the jury arrived at their verdict by drawing lots, or in any other way made an improper compromise without really trying the issues submitted to them (*Falvey v. Stanford*, L R 10 Q B 54), or if handbills abusing the plaintiff were distributed in Court, and shown to the jury on the day of trial (*Coster v Merest*, 3 B & B. 272)

(viii) Where the damages claimed are unliquidated, the Court seldom grants a new trial on the ground that the amount awarded by the jury is either too small or too great "The assessment of damages is peculiarly the province of the jury." (*Davis v Shepstone*, 11 App Cas at p. 191.) The Court will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them. (*Praed v Graham*, 24 Q B. D. 53) But a new trial will be granted if the Court comes to the conclusion that the jury applied a wrong measure of damages or must have taken into consideration matters which they ought not to have considered (*Johnston v Gt W Ry Co.*, (1904) 2 K. B. 250.) The Court of Appeal on an application for a new trial has no power, without the consent of both parties, to alter the amount of damages awarded by the jury. (*Watt v Watt*, (1905) A. C. 115, overruling *Belt v. Lawes*, 12 Q B. D. 356; and *Gatty v. Farquharson*, 9 Times L. R. 593.)

Still rarer are the cases in which a new trial has been granted on the ground that the amount of the verdict is too small. The rule is that where there has been no misconduct on the part of the jury, no error in the calculation of figures, and no mistake in law on the part of the judge, a new trial

will not be granted (*Rendall v Hayward*, 5 Bing N. C 424; *Forsdike v. Stone*, L R 3 C. P. 607.) But a new trial will be granted if it can be shown that the jury wholly omitted to consider some substantial element of damage which they ought to have taken into their consideration. (*Phillips v. L & S W Ry. Co*, 5 Q B D. 78; *Johnston v Gt W. Ry Co.*, (1904) 2 K B. 250.)

Appeal as to Costs.

By sect 49 of the Judicature Act, 1873, no order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only,* when such costs are by law left to the discretion of the Court or that judge, shall be subject to any appeal, except by leave of the Court or judge making such order

But it often happens that a decision which in form affects costs only is really a decision on the merits of the case, or involves the decision of some matter of principle, or implies that one of the parties has been guilty of misconduct In these cases an appeal is allowed, *e.g.*, where a trustee (*Cotterell v. Stratton*, L R 8 Ch 295; *In re Isaac*, (1897) 1 Ch 251), or an executor (*Farrow v Austin*, 18 Ch. D. 58), or a mortgagee (*In re Beddoe*, (1893) 1 Ch. p. 555), or an official liquidator (*In re Silver Valley Mines*, 21 Ch D. 381) is refused costs. So where a solicitor is ordered to pay costs personally (*In re Bradford*, 15 Q B. D. 635.) "Where the judge's jurisdiction over costs depends upon the existence of some breach of an injunction or misconduct, it seems to me that an appeal lies against his finding that there has been a breach of the injunction or misconduct, even although he only inflicts costs Such a case is not, I think, within Order LXV. r. 1. It really is an appeal against the finding, by means of which the judge clothes

* The rule that no appeal is allowed as to costs only does not apply to an appeal from a Master to a judge at Chambers in the King's Bench Division (*Foster v Edwards*, 48 L J. Q. B. 767; *post*, p. 365.) No appeal lies from the decision of an official referee as to costs, when the whole action has been referred to him, except by his leave (*Minister & Co. v. Apperly*, (1902) 1 K B 643, 86 L T. 625)

himself with the jurisdiction to inflict costs" (*Per* Bowen, L. J., in *Stevens v Metropolitan District Ry. Co*, 29 Ch D at p 73) Thus, where at the trial the judge simply ordered the successful defendant to pay the costs of the action, an appeal lay, for such an order could not have been made without in effect deciding that the plaintiff had a good cause of action, and that was therefore the real question involved in the appeal. (*Dicks v Yates*, 18 Ch D 76) So, if a judge who has tried an action in the King's Bench Division with a jury makes a special order under Order LXV r. 1, depriving the successful party of costs, an appeal lies on the question whether any "good cause" existed enabling him to make such an order. For this is not an appeal as to costs, but as to the jurisdiction of the judge to make any order at all affecting the costs. (*Jones v. Curling*, 13 Q B D. 262, *Huxley v West London Extension Ry. Co*, 14 App Cas. 26.)

Appeal from an Interlocutory Order or Judgment.

From any order made in the King's Bench Division by a Master or District Registrar (Order XXXV r 9) there is always an appeal as of right to the judge at chambers. So in the Chancery Division any party is entitled to have any matter that has been before the Master reheard by the judge, though such a rehearing is not strictly an appeal. Once the judge has given his decision, all further appeal is discouraged. In all matters of practice and procedure—and these words have received a very wide interpretation—every appeal from the decision of a judge in an action pending in the High Court is to the Court of Appeal, and, save in the few cases mentioned below, no appeal at all is allowed, except by leave of the judge or of the Court of Appeal. Again, an appeal from an inferior Court lies, as a rule, to a Divisional Court (see *ante*, p. 327, n.), and in such a case no further appeal is allowed from the decision of the Divisional Court, except by leave of that Court or of the Court of Appeal. (Jud Act, 1894, s 1 (5), *Wynne-Finch v. Chaytor*, (1903) 2 Ch. 475) The leave of the Divisional Court or judge should be asked first, if it is refused, then the leave of the Court of Appeal may be asked, but it is rarely granted where the Court or judge below has refused leave. (But see *Moore & Co. v. Singer, &c Co*, (1904) 1 K. B. 820.) Leave may be given to appeal on one point only (*Jones v Biernstein*, (1900) 1 Q B 100)

In a few cases an appeal lies without leave—

- (a) from an order refusing unconditional leave to defend an action (Jud. Act, 1894, s 1 (2));
- (b) wherever the liberty of the subject or the custody of infants is concerned;
- (c) in all cases of granting or refusing an injunction or appointing a receiver,
- (d) from any decision determining the claim of any creditor, or the liability of any contributory, or the liability of any director or other officer in respect of misfeasance or otherwise under the Companies (Consolidation) Act, 1908;
- (e) from the summary decision of a judge in an interpleader proceeding (*Waterhouse & Co. v. Gilbert*, 15 Q. B. D. 569; *Van Laun & Co. v. Baring Brothers & Co.*, (1903) 2 K. B. 277);
- (f) from any order on a special case stated under the Arbitration Act, 1889 (Jud. Act, 1894, s. 1 (1)).

On the other hand, there are some cases in which no appeal lies at all to the Court of Appeal, leave or no leave—

- (a) in any criminal cause or matter* (Jud. Act, 1873, s 47),
- (b) from any order made by consent,
- (c) from any order made as to costs only (see *ante*, p. 335);
- (d) from an order extending time for appealing (Jud. Act, 1894, s. 1 (1) (a)),
- (e) from an order of a judge giving unconditional leave to defend an action (Jud. Act, 1894, s 1 (3)),
- (f) from the High Court, sitting as a Prize Court (Jud. Act, 1891, s. 4),

* These words have been construed very comprehensively. No appeal is allowed on "any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." (*Per* Lord Esher, M. R., in *Ex parte Woodhall*, 20 Q. B. D. at p. 836.) And the subject-matter is deemed to be criminal whenever the proceedings may end in the imprisonment of the defendant (*Seaman v. Burley*, (1896) 2 Q. B. 344), unless a statute has expressly declared the money sought to be recovered by such proceedings to be "a civil debt." (*Southwark and Vauxhall Water Co. v. Hampton U. D. C.*, (1899) 1 Q. B. 273.)

- (g) where any statute provides that the decision of the Court or judge below is to be final (App. Jur Act, 1876, s. 20; see *Ex parte Pulbrook*, (1892) 1 Q. B. 86),
- (h) where any statute provides that there shall be no appeal, except with the leave of some specified person, and he refuses to give leave (*Ex parte Stevenson*, (1892) 1 Q. B. 394, 609, *Lane v Esdaile*, (1891) A. C. 210),
- (i) and, probably, there is no appeal from the decision of a judge expunging the entry at Stationers' Hall of copyright in a picture (*Chappell v Purday*, 12 M. & W. 303; *Ex parte Davidson*, 2 E. & B. 578; 18 C. B. 297; "*The Young Duchess*," 8 Times L. R. 41).

An appeal from an interlocutory judgment or order may be heard by two judges (Jud Act, 1875, s. 12.) As to the time within which notice of appeal must be served, see Order LVIII. r. 15.

House of Lords

From the Court of Appeal there is, for those who can afford the luxury, an appeal to the House of Lords. The practice on such appeal is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, and the Appeal (*Formâ Pauperis*) Act, 1893, and by certain standing orders and directions which will be found in the Annual Practice, 1912, Vol II, Part VII, pp. 952—980; and in Denison and Scott's House of Lords Practice

CHAPTER XXI.

EXECUTION

EXECUTION is the process by which a judgment of the Court is enforced. And it behoves a successful plaintiff to proceed to execution promptly, lest he lose the fruits of his victory.

Execution is generally effected by a writ directed to the sheriff or other proper person, commanding him to take certain compulsory proceedings for the purpose of carrying into effect the judgment of the Court. There are several such writs; and it is not proposed to discuss in detail in this chapter all the various methods of execution, but merely to give an outline of the most usual methods of enforcing a judgment in the ordinary form.

The simplest form of a judgment is that the defendant do pay the plaintiff £——, it is not usual to specify any time within which payment must be made, and in the absence of such a limitation, the money must be paid forthwith, and the judgment creditor may at once proceed to execution. He may sue out a writ either of *fi fa* or *elegit* under Order XLIII, or, in some cases, he can apply under Order L. r 15A for equitable execution by means of a receiver. If he knows of anyone who owes money to the judgment debtor, he can proceed to attach the debt under Order XLV. If the judgment debtor be a beneficed clerk, the profits of the living may be sequestered under rules 3 and 4 of Order XLIII. Imprisonment for debt is abolished; but a judgment debtor, who can pay and will not, may be committed to prison for six weeks under sect. 5 of the

Debtors Act, 1869 (32 & 33 Vict. c 62), such imprisonment does not extinguish the debt

1. *Fi fa* —The most ordinary form of execution is by writ of "*feri facias*" This writ commands the sheriff to *cause to be made* out of the goods and chattels of the judgment debtor the sum recovered by the judgment, together with interest at the rate of 4l per cent., and immediately after the execution of the writ to bring the money and interest before the Court, to be paid to the judgment creditor. By the authority thus given him, the sheriff may enter the house of the execution debtor and seize what goods can be found there belonging to the debtor, he must not seize goods which are the property of someone else. He may also enter the house of a third person, if the goods of the debtor be actually therein; but in this case there is always the risk that the house may contain nothing belonging to the debtor, and then the sheriff would be liable to an action of trespass

Under a *fi fa*. the sheriff may seize and sell all the personal goods and chattels belonging to the execution debtor that he can find, and which can be sold, with the exception of the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade; provided the value of such excepted articles does not exceed in the whole 5l (8 & 9 Vict. c 127, s. 8) The sheriff can sell under a *fi fa*. a lease or term of years belonging to the debtor, and execute an assignment of it under his seal of office to the purchaser. But he cannot sell an estate in fee, or for life, or an equitable interest such as an equity of redemption, or things which are fixed to the freehold and which at common law would pass on death to the heir, and not to the executor, of the owner Growing corn and other crops which are raised by the industry of man may be taken in execution; but fruits of the earth which yield no annual profit, or which are produced

without the labour of man, cannot be seized by the sheriff. The seizure and sale of straw, chaff, turnips, manure, hay, grasses, roots, vegetables, and growing crops on land let to farm are regulated by the express provisions of the statutes 56 Geo III c 50 and 14 & 15 Vict c 25, s 2. The sheriff cannot take goods which are in the custody of the law, as by distress; but since the passing of the statute 1 & 2 Vict c 110, s 12, he may seize *choses in action*, such as bank-notes, cheques, bills of exchange, bonds, and other securities for money. (See *Johnson v Pickering*, (1908) 1 K. B. 1.)

It often happens that when a sheriff seizes goods under an execution some third person intervenes and claims that the goods are his, or that he has a charge on them under a bill of sale or otherwise. In such cases, the sheriff applies to a Master at Judges' Chambers for protection. He takes out a summons called "an interpleader summons," and serves it on both the claimant and the execution creditor. All three parties then appear before the Master, who generally disposes of the case then and there, if the amount in dispute is not large and no difficult question of law or fact arises. In other cases, he directs an "issue" (see *ante*, p 64) to be tried between the claimant and the execution creditor. If the claimant will pay into Court a reasonable amount to abide the event of the issue, the sheriff will be ordered to withdraw from possession of the goods; if not, the Master will order so many of the goods to be sold as will realize the amount of the judgment. The procedure on an interpleader summons and issue is now regulated by Order LVII *

* This is called "a sheriff's interpleader," to distinguish it from an analogous proceeding called "a stakeholder's interpleader," which has nothing to do with the execution of a judgment. A stakeholder's interpleader arises in this way: an action is sometimes brought against a person to recover money or goods in which he himself claims no interest, but which is claimed by someone besides the plaintiff. It is obviously

2 *Elegit* —Where the debtor has land, a writ of “*elegit*” may also issue to enforce a judgment for the payment of money. Under this writ the sheriff places the execution creditor in possession of the whole of the debtor’s land, which he holds till the judgment is satisfied. Formerly under an *elegit* the sheriff could also seize the debtor’s goods, but now, by sect 169 of the Bankruptcy Act, 1883, a writ of *elegit* no longer extends to goods. Under the statute 27 & 28 Vict. c. 112, no judgment affects land so as to be a charge on it until it has actually been taken in execution by the sheriff; and this is so, even where the interest of the judgment debtor in the land is of such a kind that it cannot be taken in execution (*Hood-Barrs v Cathcart*, (1895) 2 Ch. 411)

3. *Equitable execution* —In some cases in which execution could not be had at law, equitable relief could be obtained by the appointment of a receiver. Though called equitable execution, “it is not execution, but a substitute for execution” (*Per Bowen, L J*, in *In re Shephard*, 43 Ch. D. at p. 137) Thus, a receiver will be appointed to receive a fund in Court, or a legacy not yet payable, or a share of the proceeds of the sale of land not yet sold. The appointment of such a receiver operates as an injunction to restrain the judgment debtor from himself receiving the moneys, and prevents his dealing with them to the prejudice of the execution creditor (*In re The Marquis of Anglesey*, (1903) 2 Ch. 727.) In this way, too, an execution

unjust that the defendant should, under these circumstances, be put to the expense of defending an action in which he has no interest, while, on the other hand, if he pays the debt, or hands over the goods, to the plaintiff, he may expose himself to an action at the suit of the other claimant. Such a defendant is allowed to take out an interpleader summons under Order LVII., on the hearing of which the action will be summarily stopped against the defendant, and the two adverse claimants will be made parties to an interpleader issue, and so fight out the matter between themselves

creditor can sometimes secure payment of his debt out of an equity of redemption or any other interest in land which could not be reached by the ordinary process of execution at law. A judge will only appoint a receiver in cases in which such an appointment would have been made before the Judicature Act. (*Holmes v. Millage*, (1893) 1 Q. B. at p. 558, *Harris v. Beauchamp*, (1894) 1 Q. B. 801, and see *Goldschmidt v. Metallwerke*, (1906) 1 K. B. 373) And in determining whether it is just and convenient to appoint a receiver by way of equitable execution, the judge will always have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment (Order L. r. 15A.)

The judgment creditor of a man who is a partner in a firm can, under sect 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), obtain an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and by the same or a subsequent order a receiver may be appointed of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership. (And see Order XLVI. r. 1A.)

4. *Attachment of debts* —Any debt owing to the judgment debtor from any other person within the jurisdiction of the Court can be recovered by the judgment creditor towards the satisfaction of his judgment, by a process known as "attachment of debts" In order to ascertain what debts are owing to the debtor, it is often necessary to obtain an order for his examination. If the judgment debtor disobeys the order, he is liable to be committed to prison. Either before or after any oral examination of the judgment debtor, the judgment creditor may apply *ex parte* to a Master for an order, which is technically known as "a garnishee order *nisi*." He must

be prepared with an affidavit showing that judgment has been recovered, and is still unsatisfied, and to what amount, and that a certain person named, within jurisdiction, owes the judgment debtor money. The Master thereupon may make an order attaching the debt owing or accruing to the judgment debtor from such person (who is henceforth called "the garnishee"), and ordering the garnishee to appear and show cause why he should not pay such debt to the judgment creditor, or so much of it as may suffice to satisfy his claim (Order XLV. r 1.) This order should, as a rule, be personally served upon the garnishee, and, as soon as it is served on him, it binds the debt in his hands; he must not after service pay any money to the judgment debtor (r 2; *Edmunds v Edmunds*, (1904) P 362) The garnishee must appear as the order directs, if he wishes to dispute the debt or his liability to be thus garnished. If the garnishee does not appear in obedience to the order *nisi*, or does not dispute his liability, and does not pay into Court forthwith the amount due from him to the judgment debtor, or an amount equal to the judgment debt, the Master may order execution to issue against the garnishee without any previous writ or process, to levy the amount due from him, or so much thereof as may be sufficient to satisfy the judgment debt. If the garnishee appears and disputes his liability, the Master, instead of ordering that execution shall issue, may direct that any issue or question necessary for determining his liability be tried (rr. 3, 4) Payment into Court by, or execution levied on, the garnishee under any such order is a valid discharge to him of his debt to the judgment debtor, to the amount paid or levied, even though such order be subsequently set aside, or the judgment reversed (r 7)

5 An order charging stock or shares belonging to the judgment debtor may also be applied for under Order XLVI.

The same Order deals with proceedings in lieu of *distringas* and stop orders.

6. *Writ of possession* —If the plaintiff succeeds in an action for the recovery of land, the judgment will be “that the plaintiff do recover possession of the land in the Statement of Claim described as—”; and the plaintiff is entitled at once to a *writ of possession*, bidding the sheriff to enter on the same, and without delay to “cause the plaintiff to have possession of the said land and premises with the appurtenances” A *fi. fa* for the amount of the mesne profits and costs may be joined in the same writ The costs of a writ of possession are in the discretion of the Court (*Dartford Brewery Co, Ltd v. Moseley*, (1906) 1 K. B. 462)

7. *Writ of delivery* —If a plaintiff has recovered judgment for the recovery of any property other than land or money, he must wait fourteen days before issuing execution, unless he can obtain special leave to issue it at an earlier date. (Order XLII r 19) The defendant is allowed this interval in which to comply voluntarily with the order of the Court If he does not obey the judgment within that period, a *writ of delivery* will issue. as to which, see Order XLVIII , and *Hymas v Ogden*, (1905) 1 K. B. 246 Such a judgment may also be enforced by writ of attachment or by writ of sequestration. (Order XLII. r. 6.)

8. *Writ of attachment*.—Where a judgment directs the performance of any specific act other than the payment of money (such as the removal of a nuisance or the production of an account), or requires anyone to abstain from doing anything, it may be enforced by proceedings against the person, and sometimes also against the goods, of the party involved. (Order XLII r 7.) Wilful disobedience to a judgment directing any person to do a specific act is a

contempt of Court, and is punished by stringent process. A copy of the judgment must first be personally served on him, indorsed with a special memorandum in the form given in Order XLI r. 5, unless indeed he has already had notice of the judgment and is evading formal service thereof. (*Kistler v Tettmar*, (1905) 1 K B 39) The plaintiff must then wait till the time specified in the judgment for doing the act has elapsed, or, if no such time be specified, till a reasonable time has elapsed. He may then apply for a writ of attachment commanding the sheriff to arrest the person, and bring him before the Court to answer for his contempt. The leave of a judge must be obtained before issuing a writ of attachment, and notice of the application for leave must be given to the party whom it is proposed to attach (Order XLIV. r. 2, *In re Evans*, (1893) 1 Ch. 252.) The person attached, in general, remains in prison until he has purged his contempt by doing the act required. A judgment for the payment of money into Court may in some cases be enforced by attachment, but more generally by sequestration. (Order XLII. r. 4)

9. *Writ of sequestration*.—Where any person is by any judgment or order directed to pay money into Court, or to do any other act in a limited time, and after due service of such judgment or order wilfully disobeys the same, the person prosecuting such judgment or order will, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person (Order XLIII r. 6; *Stancomb v. Trowbridge U D. C.*, (1910) 2 Ch. 190) But a writ of sequestration will not issue against the corporate property of any corporation without special leave. (Order XLII. r. 31.) Such a writ is directed to commissioners, generally four in number, called

sequestrators, giving them authority to enter on the lands of the person in contempt and sequester and receive into their hands the rents and profits of all his real estate, and all his goods and chattels, and to detain them until the contempt be cleared. All moneys that come into the hands of the sequestrators may be applied by them to meet the demand of the party prosecuting the writ. But they must apply for leave before they sell any of the goods and chattels sequestered, and the proceeds of such a sale will be dealt with as the Court may direct

If judgment has been recovered against a firm, execution can at once issue without leave against all property of the firm within jurisdiction, and also against the goods of any individual partner who was served with the writ. But the plaintiff cannot without leave issue execution against any person who was not served with the writ. If such person dispute his liability an issue will probably be directed to determine whether he was a partner or held himself out as a partner at the date of the contract. (Order XLVIII. r 8, *Davis v. Hyman*, (1903) 1 K. B. 854.)

CHAPTER XXII.

COSTS

LAST comes the important question of "Costs." The word is sometimes used to denote the remuneration which a party pays to his own solicitor. But it properly means that sum of money which the Court or a judge orders one litigant to pay to another to compensate the latter for the expense which he has incurred in the litigation. The amount so awarded seldom, if ever, repays the whole outlay which the successful litigant has been compelled to make, for the order of the Court or judge almost invariably directs that the costs be taxed, and the taxing Master very rarely allows the full amount which the successful party has to pay to his own solicitor. The amount allowed on taxation is called "taxed costs," and this, as a rule, is all that the unsuccessful party has to pay to his opponent. The difference between "taxed costs" and the amount which the successful party is liable to pay to his own solicitor is known as "extra costs," and this the successful party must pay out of his own pocket. Sometimes, however, the Court or judge orders that the costs payable by one party to another should be taxed "as between solicitor and client," and then a much more liberal allowance is made. All costs are allowed which a solicitor would reasonably incur in the ordinary conduct of the case. But it often happens that even after a taxation of this kind the successful party is still called on to pay some portion of his solicitor's bill; for the taxing Master may think that some items of expense were incurred unnecessarily.

The Court of Chancery assumed from its commencement the power to deal with all questions of costs without the aid of the Legislature. Hence, subject to the express provisions of any special Act (*In re Fisher*, (1894) 1 Ch. 450), the costs of a Chancery suit have always been in the discretion of the judge who tried the case, though he is bound of course to exercise his discretion judicially. But in the Courts of common law the right to costs has always been the creature of statute, and was, by the earlier statutes at all events, made to depend entirely on the result of the litigation (or, in legal language, the costs followed the event). Whichever party had judgment recorded in his favour recovered costs, and the judge had no discretion in the matter till the seventeenth century, and then only of a very limited kind. Now, however, the right to costs in any action in the King's Bench Division depends on two questions —

Was the action tried by a judge with a jury, or by a judge alone?

Was the action of such a kind that it could have been tried in the County Court?

I. TRIAL BY JUDGE ALONE

If the action be tried by a judge alone, he has full power to deal with the costs as in his discretion he deems right. He must not, however, apply a general rule which in fact excludes the exercise of a discretion. (*Bew v. Bew*, (1899) 2 Ch. 467.) Materials must exist upon which the discretion can be exercised (*Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K. B. 756, *F. King & Co. v. Gillard & Co.*, (1905) 2 Ch. 7), and his discretion must be exercised judicially (*Edmund v. Martell*, 24 Times L. R. 25). The judge generally deals expressly with the costs in his judgment. If he does not, the counsel for the successful party should ask for them.

II TRIAL BY JURY.

Where, however, the action is tried by a judge with a jury, different considerations apply; and the result will largely depend on whether the action could or could not have been tried in the County Court. Let us deal first with cases over which a County Court has no jurisdiction

(a) *Actions of a kind that cannot be tried in a County Court*

Actions for breach of promise of marriage, libel, slander, and seduction cannot be commenced in the County Court, nor can actions involving the title to any toll, fair, market or franchise, nor actions of ejectment nor any other action, in which the title to any corporeal or incorporeal hereditament comes in question or where an easement or licence over hereditaments is claimed, if the yearly rent or value of the hereditaments exceeds 100*l* a year. To these actions, therefore, sect 116 of the County Courts Act, 1888, does not apply, and the amount recovered does not decide the question of costs. A verdict for any amount, however small, will carry costs, unless the judge before whom such action is tried, or the Court, "shall for good cause otherwise order" (Order LXV. r 1.)* In other words, if an action that cannot be heard in a County Court be tried in the High Court by a judge and jury, the successful party will be entitled to his costs, unless some special order be made, and such an order can only be made "for good cause."

Hence, however small the verdict, the plaintiff's counsel need not ask for costs, his client will have the general costs of the action, if nothing be said.† It is for the defendant's

* The provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c 61), do not deprive the judge of his power in a proper case to make a special order as to costs. This is so, whether the action has been tried with or without a jury. (*Bostock v Ramsey U. D. C.*, (1900) 1 Q. B. 357, (1900) 2 Q. B. 616; *Leckhampton Quarries Co. v. Ballinger*, 93 L. T. 93)

† There is an exception to this rule. By sect. 1 of the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), in any action for words spoken

counsel in such a case to apply to the judge, as soon as the verdict is given, for an order depriving the plaintiff of his costs. As a rule, such an order will only be made where “contemptuous” damages, such as a farthing or a shilling, have been given, and not always then. There must be some good cause, beside the smallness of the damages, to give the judge jurisdiction to make such an order—something either in the conduct of the parties or in the facts of the case which, in spite of the finding of the jury, makes it more just that the costs should not follow the event (*Jones v. Curling*, 13 Q. B. D. 262; but see the remark of Phillimore, J., in *Nicolas v. Atkinson*, 25 Times L. R. 568.)

A successful defendant may also be deprived of his costs, if there be good cause. (*Sutcliffe v. Smith*, 2 Times L. R. 881, *Granville & Co. v. Firth*, 72 L. J. K. B. 152; *Butler v. Rice*, (1910) 2 Ch. 277.) But he cannot be made to pay the whole costs of the action under any circumstances. (*Dicks v. Yates*, 18 Ch. D. 76, 85; *Re Foster v. Gt. W. Ry. Co.*, 8 Q. B. D. at pp. 521, 522, *Andrew v. Grove*, (1902) 1 K. B. 625.)

“The judge should look, in the first place, at the result of the action itself, namely, the verdict of the jury, and he should look also at the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation, and beyond that he should consider all the facts of the case so far as no particular fact was concluded by the finding of the jury” (*Per Bowen, L. J.*, in *Jones v. Curling*, 13 Q. B. D. at p. 272) “But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circum-

and made actionable by that Act, “a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action” Hence, in this case it is necessary for the plaintiff’s counsel to ask for a certificate, unless the verdict is so large that it clearly exceeds the amount at which the costs of the action will be taxed.

stances of the case—everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of.” (*Per* James, L J, in *Harnett v. Vise*, 5 Ex. D. at p 311) “Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs” (*Per* Lord Halsbury, L. C., in *Huxley v. West London Extension Ry. Co.*, 14 App Cas. at p. 32.) The words “good cause” embrace “everything for which the party is responsible connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense.” (*Per* Lord Watson, *ib.* at p 33.) “The judge is not confined to the consideration of the defendant’s conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation.” (*Per* A L Smith, L J, in *Bostock v. Ramsey U D C.*, (1900) 2 Q B at p. 622.)

Illustrations

“The mere fact of a plaintiff, in an action for libel or slander, recovering only a farthing or a shilling damages is not of itself good cause for depriving him of costs ‘Good cause’ must be something more than the mere smallness of damages The smallness of the damages, however, is an important element to be considered, if there are any other circumstances which can be taken into account.” *Per* A. L. Smith, L. J, in *O’Connor v The Star Newspaper Co., Ltd.*, 68 L. T. at p. 148.
Tipping v. Jepson, 22 Times L. R. 743.

“Should the jury, in an action for an assault or libel, award the plaintiff an ignominious compensation, it would not follow that the judge ought as of course to deprive him of his costs, although he might treat it as an indication of the opinion of the jury, in which he coincided, that the character of the plaintiff was worthless, and that the action never ought to have been brought, and was therefore oppressive.” *Per* Hawkins, J., in

Roberts v. Jones and Willey v. Gt N Ry. Co., (1891) 2 Q. B at p. 198.

If the action is unfairly or oppressively brought, or is unfairly or oppressively persisted in, good cause will exist for depriving the plaintiff of the ordinary costs. *Per* Lord Esher, M. R, in

Barnes v. Malby, 5 Times L. R. 207

But bringing an action to recover money which is in fact due to the plaintiff cannot be said to be oppressive *Per* Lord Esher, M. R., in *Wilts, &c. Dairy Association v Hammond*, 5 Times L. R. 196.

That the defendant won the action by relying on a merely technical defence is not good cause for depriving him of costs
Granville & Co v Firth, 72 L. J. K. B. 152, 88 L. T. 9

The mere fact that a plaintiff in an action for unliquidated damages claimed 600*l* and only recovered 50*l*. is no ground for depriving him of costs *Per* Lord Esher, M. R., in
Pearman v. Baroness Burdett-Coutts, 3 Times L. R. at p 720

But where a plaintiff preferred an extravagant and an extortionate claim, supported it by fraudulent statements and dishonest acts, and endeavoured to substantiate it before the jury, by evidence which they very properly disbelieved, the judge at the trial, the Court of Appeal, and the House of Lords all agreed that there was perfectly good cause for depriving him of his costs, although he had recovered 50*l*. damages.

Huxley v. West London Extension Ry. Co, 17 Q. B. D. 373; 14 App. Cas. 26

Whenever a defendant by his misstatements, made under circumstances which impose an obligation upon him to be truthful, brings litigation on himself and renders an action against him reasonable, there is “good cause” to deprive him of costs.

Sutcliffe v Smith, 2 Times L. R. 881.

If the action be brought for political motives and not from a *bonâ fide* desire to obtain redress for a grievance, this will be good cause.

O'Connor v. The Star Newspaper Co, Ltd., 68 L. T. 146, 9 Times L. R. 233.

Any misconduct, folly or perversity, which led to the action being brought, may be good cause.

Harnett v. Vise, 5 Ex. D. 307; 29 W. R. 7.

But not misconduct, which has no relation to the case of the successful party.

F. King & Co. v Gullard & Co., (1905) 2 Ch. 7; 92 L. T. 605

The fact that the plaintiff's witnesses gave exaggerated evidence as to the damages, is not, by itself, good cause.

Lipman v. Pulman, (1904) W. N. 139, 91 L. T. 132.

If the judge thinks fit to make an order, that order is not necessarily that each party should pay his own costs. He

may, for very good cause, order that the successful plaintiff shall pay the defendant's costs, as well as his own. (*per* Bramwell, L. J., 15 Ch. D. at p. 41, and see *Myers v. The Financial News*, 5 Times L. R. 42), and where there has been a new trial, the judge who tries the case the second time may in the absence of any special order by the Court of Appeal direct that the successful plaintiff shall pay the whole costs of both trials (*Harris v. Petherick*, 4 Q. B. D. 611). But such an order would only be made in an extreme case, and where the plaintiff had grossly misconducted himself (See *Norman v. Johnson*, 29 Beav. 77). The judge cannot award costs as between solicitor and client to the successful party, unless there is an express statutory provision enabling him so to do (*Mordue v. Palmer*, L. R. 6 Ch. 22, 32, *Andrews v. Barnes*, 39 Ch. D. 133), or unless both parties consent.

So, too, if the judge makes an order under Order LXV r. 1, he is not bound to deal with the whole costs of the action. He may, for good cause, deprive a successful party of a portion of his costs, leaving the rest of the costs to follow the event.

Illustrations.

The judge may order a successful plaintiff to pay the costs occasioned by a claim for special damage which he has failed to substantiate.

Forster v. Farquhar, (1893) 1 Q. B. 564, 62 L. J. Q. B. 296

Or any costs unnecessarily inflicted on the defendant by the successful plaintiff's conduct of the action.

Roberts v. Jones, (1891) 2 Q. B. 194, 64 L. J. Q. B. 441.

Hill v. Morris, 8 Times L. R. 55.

So, too, the judge "has power to order a successful defendant to pay such part of the plaintiff's costs as has been caused by the defendant's misconduct in the action" *Per* Channell, J., in

Andrew v. Grove, (1902) 1 K. B. at p. 628

E.g., where the costs have been increased by the defendants improperly severing in their defences.

In re Isaac, (1897) 1 Ch. 251, 66 L. J. Ch. 160.

Bagshaw v. Pimm, (1900) P. 148, 69 L. J. P. 45.

If the judge at the trial declines to make an order depriving either party of his costs, there is no appeal from his decision (*Moore v. Gill*, 4 Times L R 738) But if he decides to make a special order as to costs, an appeal lies to the Court of Appeal on the question whether any good cause existed upon which the judge could exercise his discretion. If there was no good cause, the judge had no jurisdiction to make any order as to costs, and the Court of Appeal will set the order aside. If there was anything which could amount to good cause, then the Court of Appeal will not interfere with the judge's discretion, even though they do not approve of the way in which he has exercised it. (*Jones v. Cwling*, 13 Q B D 262, *Huxley v West London Extension Ry. Co*, 14 App. Cas. 26.)

(b) Actions of a kind that can be tried in a County Court.

But if the action be of a class which can be commenced in a County Court (*Solomon v. Mullines*, (1901) 1 K B. 76), section 116 of the County Courts Act, 1888, as amended by section 3 of the County Courts Act, 1903, applies, and a verdict for a small amount will not carry costs. If the action was founded on contract, and the plaintiff recovers less than 20l, he will be entitled to no costs whatever; if he recovers 20l. or any sum up to and including 100l, he will be entitled to County Court costs only (Order LXV r 12, *Millington v Harwood*, (1892) 2 Q. B 166)—

- (i) Unless in either case a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs (see *Neaves v. Spooner*, 36 W. R. 257, 58 L. T. 164); or
- (ii) Unless in the latter case within twenty-one days after service of the writ, or such further time as may be allowed, the plaintiff obtains an order, under

Order XIV, empowering him to enter judgment for 20*l* or more. A judge of the High Court has power to extend the time (See *Haycocks, Ltd v. Mulholland*, (1904) 1 K B 145.)

If the action was founded on tort, and the plaintiff recovers less than 10*l*, he will be entitled to no costs whatever; if he recovers 10*l* or more, but less than 20*l*, he will be entitled to County Court costs only—unless in either case a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs (County Courts Act, 1888, s. 116.)

In both cases, therefore, it is the duty of the plaintiff's counsel to apply to the judge for such a certificate or special order.

Section 116 applies whenever the plaintiff's claim is reduced below the limit by an admitted set-off, as distinct from a counterclaim (*Lovejoy v. Cole*, (1894) 2 Q. B. 861); but not where it is so reduced by a set-off which he does not admit, or by a counterclaim (*Stooke v. Taylor*, 5 Q. B. D. 569, *Goldhill v. Clark*, 68 L. T. 414), or by a payment made to the plaintiff out of Court after action brought. (*Pearce v. Bolton*, (1902) 2 K B 111.) It does not apply to any counterclaim, the defendant is always entitled to the costs of his counterclaim, if he recovers under it any amount, however small, because he is not responsible for the action being commenced in the High Court (*Blake v. Appleyard*, 3 Ex. D. 195; *Lewin v. Trimming*, 21 Q. B. D. 230.) Nor does the section apply as between the defendant and a third party whom he has brought in. (*Per* Field, J., in *Bates v. Burchell*, (1884) W. N. 108.) But it does apply to an action commenced in an inferior Court, and removed into the High Court by *certiorari* (*Pellas v. Breslauer*, L. R. 6 Q. B. 438), and to an action brought in the High Court by a solicitor for his costs. (*Blair v. Eisler*, 21 Q. B. D. 185.) Moreover, if the plaintiff, in addition to recovering nominal damages, obtains an injunction or other equitable relief, he will be entitled to his costs in spite of sect. 116. (*Keates v. Woodward*, (1902) 1 K B 532.)

Whether an action is founded on contract or tort, depends on the facts of the case, not on the form of the pleadings. The test is, can

the plaintiff maintain an action without setting up and relying on a contract? If so, it is an action of tort; although the relationship between the parties may be the result of some antecedent contract

Illustrations.

An action founded on the common law liability of a bailee for negligence is an action of tort within the meaning of section 116, although the bailment was a contract

Turner v Stullibrass, (1898) 1 Q. B. 56, 77 L. T. 482.

The defendant demised certain premises to the plaintiff, and then wrongfully removed the fixtures. *Held*, that the action was founded on tort

Sachs v. Henderson, (1902) 1 K. B. 612, 71 L. J. K. B. 392.

An action by a passenger against a railway company for personal injuries caused by negligence is an action founded on tort, although he took a ticket

Taylor v M. S. & L. Ry. Co., (1895) 1 Q. B. 134, 71 L. T. 596.

Kelly v. Metropolitan Ry. Co., (1895) 1 Q. B. 944, 72 L. T. 551.

An action of detinue is, for this purpose at all events, an action of tort.

Bryant v Herbert, 3 C. P. D. 389, 47 L. J. C. P. 670.

Cohen v Foster, 61 L. J. Q. B. 643; 66 L. T. 616.

But the plaintiff will be entitled to costs, if the goods detained be recovered *in specie*

Bradley v. Archibald, (1899) 2 Ir. R. 108, approved in

Keates v. Woodward, (1902) 1 K. B. 532, 86 L. T. 369.

Du Pasquier v. Cadbury, Jones & Co., (1903) 1 K. B. 104.

So far, I have dealt only with the general costs of the action. But from such general costs must be distinguished—

(i) Special costs; and

(ii) Costs of separate issues.

(i) By "special costs" I mean the expenses of a shorthand writer's notes, of a commission abroad, of a special jury, of photographic copies of any documents, and any costs reserved to be disposed of at the trial. (*British Provident Association v. Bywater*, (1897) 2 Ch. 531; *How v Winterton*, 91 L. T. 63.) Application for all such costs must always be made as soon as judgment has been delivered, otherwise they will

not be allowed. No order can be made as to such costs after the judgment has been drawn up, they must then be borne by the party who has incurred them (*Ashworth v Outram*, 9 Ch D 483, *In re St Nazaire Co*, 12 Ch D 88, *The Turret Court*, 84 L. T. 331)

(ii) The costs of separate issues, unless otherwise ordered, do not necessarily follow the event of the whole action. Such costs follow the event each of its own issue. The party in whose favour final judgment is entered is entitled to the general costs of the action, but the other party will be entitled to the costs of any issues found for him (*Hubback v. British North Borneo Co*, (1904) 2 K. B. 473, *Hoyes v Tate*, (1907) 1 K. B. 656). This is what judges mean when they say that the word "event" must be "read distributively". The general costs of the action will, however, be found, as a rule, to exceed the costs of any number of issues. A judge sometimes makes a special order giving one party the costs of the action, except in so far as they have been increased by some particular issue having been raised (Order LXV r. 2). Or he will in some cases direct that the whole costs of the action be taxed, and that the successful party shall receive only a certain proportion of the amount at which they are taxed—a course strongly recommended by Kekewich, J, in *In re Pollard*, (1902) W. N. 49. Or he may award any party a lump sum in lieu of taxed costs (r. 23)

But where the plaintiff sues on two distinct *causes of action*, fails on one and wins on the other, the defendant is entitled to all his costs referable solely to the first cause of action, the plaintiff to all his costs referable solely to the second cause of action, and the costs common to both causes of action must be apportioned between them. (*Todd v. N. E. Ry. Co.*, 88 L. T. 112)

Illustrations.

In an action for libel the defendant pleaded justification and privilege. The judge ruled that the occasion was privileged; the jury negatived

malice, but found that the words were not true. *Held*, that the defendant was entitled to the general costs of the action, the plaintiff to the costs of those witnesses only whose evidence related exclusively to the issue whether the words were true or false

Harrison v Bush, 5 E. & B. 344, 25 L J Q B. 99.

Brown v. Houston, (1901) 2 K. B. 855, 70 L. J. K. B 902

So, if the defendant offered no evidence in support of his plea of justification

Empson v. Fairfax, 8 A. & E. 296

In an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the jury found that there was a public, but not a private right of way *Held*, that the plaintiff was entitled to the general costs of the action, and the defendant only to the costs of the issue on which he had succeeded, namely, as to the private right of way

Smyth v Wilson, (1904) 2 Ir. R 40

The Registrar of Trade Marks granted W C & Co. leave to register a trade mark The R B. P. Co. appealed against the order, and on the appeal raised several issues as to the user and non-user of the trade mark before 1875 and its subsequent abandonment On these issues the R. B. P. Co. failed, but the appeal was allowed and the order of the Registrar reversed. Byrne, J, ordered W C & Co. to pay to the R B. P. Co. all the costs of the appeal, except so far as such costs had been increased by the issues of fact found against them

In re Wright, Crossley & Co., (1900) 2 Ch. 218, 229

Payment into Court.

If the defendant pays a sum of money into Court, and the plaintiff accepts it in satisfaction of his claim, he is entitled to his costs, even though the sum paid in be only sixpence (Order XXII r 7; *M'Sheffrey v Lanagan*, 20 L. R. Ir 328); but if a judge at chambers thinks that the whole action was useless or malicious, he may, in such a case, deprive the plaintiff of his costs (*Broadhurst v Willey*, (1876) W. N 21, *Nichols v. Evens*, 22 Ch D 611.) If the plaintiff does not accept the sum paid into Court, but continues his action in the hope of recovering more, he will be entitled to the whole of his costs of the action if the amount of the ultimate verdict be

larger than the sum paid into Court. But if the jury find a verdict for an amount not greater than the sum in Court, the plaintiff is, in the absence of any special order, entitled to have his costs of the action up to the time when the money was paid into Court, and the defendant to have his costs incurred after that time, less any severable costs subsequent to the payment into Court in respect of any issue on which the plaintiff has succeeded (*Powell v. Vickers, Sons & Maxim, Ltd.*, (1907) 1 K. B. 71, *Fitzgerald v. Thomas Tilling, Ltd.*, 96 L. T. 718, *The Blanche*, (1908) P. 259.)

As to the costs of a counterclaim, see *ante*, pp. 249, 356

Illustrations

Payment into Court is a necessary part of a plea under sect. 2 of Lord Campbell's Libel Act. Hence, if the jury find a verdict for the plaintiff for an amount less than the sum paid into Court, but also find that the defendant was guilty of malice or gross negligence, the plaintiff will be entitled to the general costs of the action, because the defendant has failed to prove the whole of his plea.

Oxley v. Wilkes, (1898) 2 Q. B. 56, 67 L. J. Q. B. 678

In all other cases, when a plaintiff recovers less than the amount which the defendant has paid into Court, the defendant is *prima facie* entitled to the general costs of the action, but must pay the costs of any issue on which he has failed, even though that issue was not one going to the whole cause of action.

Hubback v. British North Borneo Co., (1904) 2 K. B. 473.

Ridout v. Green, 87 L. T. 679, 18 Times L. R. 709

The plaintiff claimed damages for injuries caused by the defendant's negligence. The defendant denied all negligence, but paid 80l. into Court. The jury found that the defendant was guilty of negligence, and assessed the damage at 35l. *Held*, that the judge at the trial acted rightly in directing that judgment should be entered for the defendant, that the plaintiff should have the general costs of the action up to the date of the payment into Court, the defendant the general costs of the action after that date, and that the plaintiff should have the costs of the issue, negligence or no negligence.

Wagstaffe v. Bentley, (1902) 1 K. B. 124, 85 L. T. 744

Smith v. Northleach R. D. Co., (1902) 1 Ch. 197.

Dunn v. S. E. & C. Ry. Co., (1903) 1 K. B. 358.

Haskell Golf Ball Co. v. Hutchinson and Main, (1906) 1 Ch. 518.

The Blanche, (1908) P. 259, 77 L. J. P. 99.

Married Women.

A married woman may be ordered to pay costs, and if she instituted the proceedings, and fails, she may be ordered to pay the costs out of property which is subject to a restraint on anticipation (56 & 57 Vict c 63, s 2, *Marchioness of Huntly v. Gaskell*, (1905) 2 Ch 656) An order may be made under this section as to the costs of a counterclaim raised unsuccessfully by a married woman defendant (*Hood-Barrs v Cathcart* (2), (1895) 1 Q B 873) Otherwise the section only applies to cases where a married woman is plaintiff, no such order can be made as to the costs of any motion or appeal made by a married woman in an action in which she is a defendant (*Hood-Barrs v Cathcart* (1), (1894) 3 Ch 376, *Hood-Barrs v Hervot*, (1897) A C 177)

Several Defendants.

Where the plaintiff sues two defendants who defend jointly by the same solicitor, and judgment is given in favour of one defendant and against the other, the successful defendant is, in the absence of any agreement between him and his co-defendant as to how their costs are to be borne *inter se*, entitled to recover from the plaintiff half the costs of the defence (*Beaumont v Senior and Bull*, (1903) 1 K B 282) In an action claiming relief against the defendants in the alternative, if owing to the attitude taken up by the unsuccessful defendant it was reasonable to join the other defendant, the Court will order the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff (*Sanderson v. Blyth Theatre Co*, (1903) 2 K B. 533, *Bullock v L. G O. Co*, (1907) 1 K. B 264, 269; but see *Westgate v. Crowe*, (1908) 1 K B 24) Where one of several co-defendants who are ordered to pay the plaintiffs' taxed costs pays the whole of

such costs, he is entitled to obtain contribution in respect thereof from the other co-defendants in the action, and without an independent proceeding (*Newry Salt Works Co v. Macdonnell*, (1903) 2 Ir. R. 454)

Costs in the Court of Appeal

“As a rule, in the Court of Appeal costs follow the event, and if nothing is said by the Court as to costs, the order will be so drawn up. But the Court has full discretion over the costs of an appeal, and can make such order as to the whole or any part of them as may be just (Order LVIII. r 4; 53 & 54 Vict. c 44, s 5.) Hence it will, in a proper case, refuse costs to the successful party, *e g*, an appellant has been deprived of his costs where he succeeded on a point not raised in the Court below (*Hussey v Horne-Payne*, 8 Ch. D. 670, *Dye v. Dye*, 13 Q. B. D. 147), or on fresh evidence (*Arnot's Case*, 36 Ch. D. 710, *Chard v. Jervis*, 9 Q. B. D. 178), or succeeded on a mere point of law, having failed in proving allegations of fraud. (*Ex parte Cooper*, 10 Ch. D. 313.) So where the appellants were innocent persons, who had used due diligence, but had been made the victims of a forgery, their appeal was dismissed without costs. (*Cooper v Vesey*, 20 Ch. D. 611.) But the mere omission by the respondent to inform his opponent that he has a preliminary objection which proves fatal to the appeal is not a sufficient reason for depriving him of costs (*Ex parte Shead*, 15 Q. B. D. 338.)

The costs of an appeal include the costs of a shorthand writer's notes of the judgment of the Court below, but not of the evidence, except in very special circumstances (*Pilling v Joint Stock Institute*, 73 L. T. 570, Order LVIII. r 12; *Castner Kellner v. Commercial, &c Corporation*, (1899) 1 Ch. 803) The Court of Appeal should be asked to allow such costs, and also the costs of any copies of material documents

prepared for the use of the Court, as soon as judgment is given on the appeal

The provision of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b), as to costs between solicitor and client does not apply to any proceeding in the Court of Appeal (*Fielding v Morley Corporation*, (1899) 1 Ch. 1; *Shaw v Hertfordshire County Council*, (1899) 2 Q. B. at p. 286.)

If the Court of Appeal orders a new trial, the costs of the first trial abide the event of the second, unless any special order be made when the new trial is granted, or at the second trial (*Green v. Wright*, 2 C. P. D. 354, *Field v. Gt. N. Ry. Co.*, 3 Ex. D. 261) And by "the event" of the second trial is meant the result of that trial as to costs. (*Brotherton v. Metropolitan District Ry. Joint Committee*, (1894) 1 Q. B. 666, but see *Dunn v. S. E. & C. Ry. Co.*, (1903) 1 K. B. 358.)

The costs of a successful application for a new trial will, as a rule, be given to the applicant. (*Hamilton v. Seal*, (1904) 2 K. B. 262)

Costs at Judges' Chambers.

A Master or district registrar has full power to deal with the costs of any application made to him, and in some cases to dispose of the whole costs of the action. If the Master thinks that the application made to him is a proper one, he will, as a rule, make the costs of it "costs in the cause", that means that whoever loses the action will have to pay the costs of both sides. If, however, the Master orders the costs to be "defendant's costs in the cause," the plaintiff, even if successful, will not be paid his costs of that application; if he fails, he must pay both the defendant's costs and his own. If the Master orders the costs to be "defendant's costs in any event," the plaintiff will have to pay the costs of the application on both sides, whatever the result of the action; but not

at once, they will be taken into account in the ultimate taxation. It is only where the application is dismissed "with costs" that the successful party is entitled to an immediate taxation. In one or two cases the Master may award costs as between solicitor and client. (See Order XIX. r 27, and *Fricker v. Van Grutten*, (1896) 2 Ch. 649.)

An appeal lies from the Master's decision to the judge at chambers, even where it only affects costs. (*Foster v Edwards*, 48 L. J. Q B. 767.) But if the order be not appealed from at the time, the judge at the trial has no power to vary it (*Koosen v. Rose*, 45 W R 337; 76 L. T. 145)

APPENDIX OF RULES.

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APPENDIX

OF

RULES AFFECTING PLEADINGS, &c.

ORDER III r 6

SPECIALLY INDORSED WRIT

IN all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt), or (B) on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or (D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only, or (E) on a trust, or (F) in actions for the recovery of land with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the Forms in Appendix C , Sect IV , as shall be applicable to the case (*And see Precedents, Nos 32—39, 72*)

ORDER XIII

DEFAULT OF APPEARANCE.

3 Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails,

or all the defendants, if more than one, fail, to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five per cent per annum, to the date of the judgment, and costs.

5 Where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant fails, or all the defendants, if more than one, fail, to appear, the plaintiff may enter interlocutory judgment, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a judge may order a statement of claim or particulars to be filed before any assessment of damages, and may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct.

8 In case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

12 In all actions not by the rules of this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and, if the writ is not specially indorsed under Order III rule 6, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of Order XV.

ORDER XIV

SUMMARY JUDGMENT

1 —(a) Where the defendant appears to a writ of summons specially indorsed under Order III rule 6, the plaintiff may, on affidavit made by himself or by any other person who can swear

positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant, by affidavit, by his own *vivâ voce* evidence, or otherwise, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

(b) If on the hearing of any application under this Rule it shall appear that any claim which could not have been specially indorsed under Order III rule 6, has been included in the indorsement on the writ, the judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim.

2 The application by the plaintiff for leave to enter final judgment under Rule 1 shall be made by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein.

3 —(a) The defendant may show cause against such application by affidavit, or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ, or the judge may allow the defendant to be examined upon oath.

(b) The affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff's claim.

(c) The judge may, if he thinks fit, order the defendant, or in the case of a corporation, any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom.

4 If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into

Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

5 If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

6 Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit.

7 Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner.

8 —(a) Where leave, whether conditional or unconditional, is given to defend, the judge shall have power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX, and may order the action to be forthwith set down for trial.

(b) A special list shall be kept for the trial of causes in which leave to defend has been given under this Order, and in which the judge is of opinion that a prolonged trial will not be requisite; and the judge may, if he thinks it advisable, order any such action to be put into such list.

9.—(a) The costs of and incident to all applications under this Order shall be dealt with by the judge on the hearing of the application, who shall order by and to whom, and when the same shall be paid, or may refer them to the judge at the trial. Provided that in case no trial afterwards takes place, or no order as to costs is made, the costs are to be costs in the cause.

(b) If the plaintiff makes an application under this Order where the case is not within the Order, or where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, in any of such cases the application shall be dismissed with costs to be paid forthwith by the plaintiff.

10 A tenant shall have the same right to relief after a judgment under this Order for recovery of land on the ground of forfeiture for non-payment of rent as if the judgment had been given after trial

ORDER XVI r 1

PARTIES

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise, provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct

ORDER XIX

PLEADING GENERALLY

1 The following rules of pleading shall be used in the High Court of Justice.

2 The plaintiff shall, subject to the provisions of Order XX., and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions of Order XXI, and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counterclaim (if any), and the plaintiff shall, subject to the provisions of Order XXIII, and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off, or counterclaim. SUCH STATEMENTS SHALL BE AS BRIEF AS THE NATURE OF THE CASE WILL ADMIT, and the taxing officer in adjusting the costs of the action shall at the instance of

any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same

3. A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof

4. EVERY PLEADING SHALL CONTAIN, AND CONTAIN ONLY, A STATEMENT IN A SUMMARY FORM OF THE MATERIAL FACTS ON WHICH THE PARTY PLEADING RELIES FOR HIS CLAIM OR DEFENCE, AS THE CASE MAY BE, BUT NOT THE EVIDENCE BY WHICH THEY ARE TO BE PROVED, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures, and not in words. Signature of counsel shall not be necessary, but where pleadings have been settled by counsel or a special pleader, they shall be signed by him, and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person

5. The Forms in Appendices C, D., and E, when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient, any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be.

6. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be

so stated, with a reference to full particulars already delivered or to be delivered with the pleading

7 A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered upon such terms, as to costs and otherwise, as may be just

8 The party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. Save as in this Rule provided, an order for particulars shall not, unless the order otherwise provides, operate as a stay of proceedings, or give any extension of time

9 Every pleading which shall contain less than ten folios (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed

10 Every pleading or other document required to be delivered to a party or between parties shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer

11 Every pleading shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the Division to which the judge (if any) to whom the action is assigned belongs, the title of the action, and the description of the pleading, and shall be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor

13 EVERY ALLEGATION OF FACT in any pleading, not being a petition or summons, IF NOT DENIED SPECIFICALLY OR BY NECESSARY IMPLICATION, OR STATED TO BE NOT ADMITTED IN THE PLEADING OF THE OPPOSITE PARTY, SHALL BE TAKEN TO BE ADMITTED, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

14 Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading

15 THE DEFENDANT OR PLAINTIFF (AS THE CASE MAY BE) MUST RAISE BY HIS PLEADING ALL MATTERS WHICH SHOW THE ACTION OR COUNTERCLAIM NOT TO BE MAINTAINABLE, OR THAT THE TRANSACTION IS EITHER VOID OR VOIDABLE IN POINT OF LAW, AND ALL SUCH GROUNDS OF DEFENCE OR REPLY, AS THE CASE MAY BE, AS IF NOT RAISED WOULD BE LIKELY TO TAKE THE OPPOSITE PARTY BY SURPRISE, OR WOULD RAISE ISSUES OF FACT NOT ARISING OUT OF THE PRECEDING PLEADINGS, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds

16 No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same

17. It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but EACH PARTY MUST DEAL SPECIFICALLY WITH EACH ALLEGATION OF FACT OF WHICH HE DOES NOT ADMIT THE TRUTH, except damages

18. Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading (if any), subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted

19. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, HE MUST NOT DO SO EVASIVELY, BUT ANSWER THE POINT OF SUBSTANCE. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else

set out how much he received And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances

20 When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise

21 Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material

22 Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred

23 Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material

24 Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

25 NEITHER PARTY NEED IN ANY PLEADING ALLEGE ANY MATTER OF FACT WHICH THE LAW PRESUMES IN HIS FAVOUR, OR AS TO WHICH THE BURDEN OF PROOF LIES UPON THE OTHER SIDE, unless the same has first been specifically denied (*e g*, consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim)

26 No technical objection shall be raised to any pleading on the ground of any alleged want of form

27. The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action, and may, in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client

ORDER XX

STATEMENT OF CLAIM

1 The delivery of statements of claim shall be regulated as follows —

(a) Where the writ is specially indorsed under Order III rule 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim.

(b) Subject to the provisions of Order XIII rule 12, as to filing a statement of claim when there is no appearance, no statement of claim shall be delivered unless the same be ordered under Order XXX or Order XVIII^A rule 3.

(c) When delivery of a statement of claim is ordered the same shall be delivered within the time specified in the order, or, if no time be so specified, within twenty-one days from the date of the order, unless in either case the time be extended by the Court or a judge

4 Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ

5 [Repealed by R. S. C., July, 1902, r. 4.]

6 Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counterclaim made, or relief claimed by the defendant, in his defence

7 Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct

grounds, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim, founded upon separate and distinct facts

8 In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings

ORDER XXI

DEFENCE AND COUNTERCLAIM

1 In actions for a debt or liquidated demand in money comprised in Order III. rule 6, a mere denial of the debt shall be inadmissible

2 In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e g*, the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note

3 In actions comprised in Order III rule 6, classes (A) and (B.), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed, *e g*, in actions for goods bargained and sold or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed, in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff

4 No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted

5 If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically

6 Where a defendant has appeared to a writ of summons specially indorsed under Order III rule 6, he shall deliver his defence within ten days from the time limited for appearance,

unless such time is extended by the Court or judge, or unless in the meantime the plaintiff serves a summons for judgment under Order XIV., or a summons for directions

7 Where leave has been given to a defendant to defend under Order XIV., he shall deliver his defence (if any) within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

8 Where a statement of claim is delivered pursuant to an order, or filed in default of appearance under Order XIII rule 12, the defendant, unless otherwise ordered, shall deliver his defence within such time (if any) as shall be specified in such order, or, if no time be specified, within ten days from the delivery, or filing in default, of the statement of claim, unless in either case the time is extended by the Court or a judge

9 Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted

10. Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim

11. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff

12 Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No 2 in Appendix B, or to the like effect

13 Any person not a defendant to the action, who is served with a defence and counterclaim as aforesaid, must appear thereto

as if he had been served with a writ of summons to appear in an action

14 Any person named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim

15 Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply apply to the Court or a judge for an order that such counterclaim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just

16 If, in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with

17 Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case

20 No plea or defence shall be pleaded in abatement

21 No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned.

ORDER XXII r 22

PAYMENT INTO COURT

Where a cause or matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is

No 83

POLICY OF LIFE ASSURANCE

1 In the month of July, 1910, Joseph Brown (mentioned in the Statement of Claim, and hereinafter called "the assured") was desirous to effect an insurance with the defendant company, and signed and delivered to them a declaration in writing, dated the 5th day of July, 1910, which he agreed should be the basis of the contract of assurance which he desired to effect with the defendant company. And on the faith of the statements contained in the said declaration the defendant company granted him the policy sued on, No 24,942. In the said declaration the assured stated that his age next birthday was 69 years.

2. By the said policy, after reciting the facts in the last paragraph mentioned, and that satisfactory evidence of the statement as to age had to be furnished to the directors, the defendant company covenanted to pay 1,000*l* to the executors, administrators, or assigns of the assured, within one calendar month next after satisfactory proof of title and of the age and death of the assured should have been duly furnished to the directors of the defendant company.

3 No satisfactory proof of the title of the plaintiff or of the age of the assured has ever been furnished to the directors of the defendant company.

4 The defendant company does not admit that the plaintiff is the legal personal representative of the assured.

5. It was a condition of the said policy that all persons making claims thereunder must give satisfactory proof of the time of birth of the assured and of their title to receive any sum due under the said policy, and such further information on each point as the directors should think reasonable. The plaintiff has given no satisfactory proof of the time of birth of the assured, or of her title.

6 It was a condition of the said policy that the declaration, referred to in paragraph 1 above, should form the basis of the contract between the assured and the defendant company, and that if the said declaration was not in all respects true, the said policy should be void. The said declaration was not in all respects true. The age of the assured, on his next birthday, was then

such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just

4 The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just

5 No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not

ORDER XXVII r 13

DEFAULT OF PLEADING

If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue

ORDER XXX

SUMMONS FOR DIRECTIONS

1 —(a) Except in the cases mentioned in paragraph (d), the plaintiff in every action shall take out a summons for directions returnable in not less than four days

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of Defence under Order XXVII.

(c) Where under Order XIV the plaintiff applies for judgment, or where under Order XVIII. the defendant applies for a statement of claim, the judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

(d) This rule shall not apply to Admiralty actions within the

given, either of the fact that money has been paid into Court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into Court.

ORDER XXIII

REPLY AND SUBSEQUENT PLEADINGS

1 Except in Admiralty actions, no reply shall be delivered unless the same be ordered.

2 A plaintiff shall deliver his reply, if any, in Admiralty actions within six days, and in other actions if ordered within the time specified in the order, or if no time is so specified within ten days, after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge.

3 No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit. Every pleading subsequent to reply shall be delivered within the time specified in the order giving leave to deliver the same, or if no time be so specified within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge.

ORDER XXIV

MATTERS ARISING PENDING THE ACTION

See *ante*, pp 232, 233.

ORDER XXV

PROCEEDINGS IN LIEU OF DEMURRER

1 No demurrer shall be allowed.

2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

3. If, in the opinion of the Court or a judge, the decision of

meaning of section 34 of the Judicature Act, 1873, or to actions in which the writ is specially indorsed under Order III rule 6, or to actions coming under the provisions of Order XVIII A., or to any proceeding commenced by originating summons, but in any such action or proceeding a summons for directions may be taken out at the instance of any party thereto

2 Upon the hearing of the summons the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial Such order shall be in the Form No 4A, Appendix K, with such variations as circumstances may require. (*See Precedent, No 44*)

3 No affidavit shall be used on the hearing of the said summons except by special order of the Court or a judge

4 On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire

5 Any application subsequently to the original summons and before judgment for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application.

6 Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the cost of the party applying, unless the Court or a judge shall be of opinion that the application could not properly have been made at the hearing of the original summons

7 On the hearing of the summons, the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct.

8 In any action to which Rule 1 of this Order applies, if the

plaintiff does not within fourteen days from the entry of the defendant's appearance take out a summons for directions under this Order, the defendant shall be at liberty to apply for an order to dismiss the action, and upon such application the judge may either dismiss the action on such terms as may be just, or may deal with such application in all respects as if it were a summons for directions under this Order

ORDER LXIV

TIME

4 In causes intended to be tried during the autumn assizes at any place for which the Commission Day is fixed by order in Council for a day prior to the 1st December, and in Admiralty actions, summonses may be issued and pleadings may be amended, delivered, or filed in the long vacation on and after the 1st day of October in any year, but pleadings shall not be amended, delivered, or filed during any other part of such vacation, unless by direction of the Court or a judge.

5 Save as in the last preceding rule mentioned, the time of the long vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these rules for amending, delivering, or filing any pleading unless otherwise directed by the Court or a judge

ORDER LXX

NON-COMPLIANCE

1. Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit

2. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity

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APPENDIX

OF

PRECEDENTS.

No. 1

W R I T.

Indorsed generally.

1911 —J —No 510

In the High Court of Justice,

King's Bench Division.

Between Mary Jones

and

Richard Robinson . . Defendant

GEORGE THE FIFTH, by the grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, to Richard Robinson, of 50, Fleet Street, in the city of London We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Mary Jones, the wife of Robert M. Jones. And take notice that in default of your so doing, the plaintiff may proceed therein and judgment may be given in your absence

Witness, ROBERT THRESHIE, BARON LOREBURN,
Lord High Chancellor of Great Britain, the eleventh day
of August in the year of our Lord one thousand nine
hundred and eleven.

N.B —This writ is to be served within TWELVE calendar months from the date thereof, or, if renewed, within SIX calendar months from the date of the last renewal, including the day of such date, and not afterwards

The defendant may appear hereto by entering an appearance either personally or by solicitor, at the Central Office, Royal Courts of Justice, London

The plaintiff is a married woman, suing in respect of her separate estate

The defendant is sued as executor of the late John Corbould, and also in his own right

The plaintiff's claim is for £——, balance of moneys received by the said John Corbould during his lifetime, and by the defendant since his death, to the use of the plaintiff

And for an account

And for a receiver

This writ was issued by F W Williams of, and whose address for service is, 19, Ludgate Hill, London, E C, solicitor for the said plaintiff, who resides at 145, Belsize Park Gardens, Hampstead, N W

This writ was served by me, at 50, Fleet Street, London, E C., on the defendant, on Saturday, the 12th day of August, 1911

Indorsed the 12th day of August, 1911.

(Signed) W Forsyth,

(Address) 19, Ludgate Hill, London, E.C

No 2

MEMORANDUM OF APPEARANCE.

(Heading as in Precedent No 1)

Enter an appearance for Richard Robinson in this action

Dated the 19th day of August, 1911

(Signed) Francis Walter of 18, New Bridge Street,
London, E C, whose address for service is the same,
Solicitor for the defendant

I.—INDORSEMENTS ON WRIT.

GENERAL INDORSEMENTS.

(*Ante*, p. 38)

No 3.

FALSE IMPRISONMENT

The plaintiff's claim is for damages for the arrest and false imprisonment by the defendant of the plaintiff S J , who is the wife of the plaintiff H. J

No. 4.

FRAUD.

The plaintiff's claim is for damages for fraudulent misstatements contained in a prospectus issued by the defendant as director of the ——— Gold Mining Company, Limited

No 5

LIBEL

The plaintiff's claim is for damages for a libel contained in the ——— Independent for Saturday, November 5th, 1910, being an article headed "A New Trick" in the first column of page 5 of that issue (See Order III. r 9)

No 6

TRESPASS INJUNCTION

The plaintiff's claim is for £—— damages for the defendants' wrongfully entering the plaintiff's land, known as Red Meadow, Whitechurch, in the County of Southampton, and for an injunction restraining the defendants, their servants, workmen, and agents, from entering on the plaintiff's said meadow, or from destroying or otherwise injuring the hedge or fence on the east side thereof, or from erecting or causing to be erected a wooden or other fence on the said east side thereof, or from in any way interfering with the plaintiff's use and enjoyment of the said meadow.

No 7

TRESPASS BY A MAN SINCE DEAD

The plaintiff's claim is against the defendants, as executors of C D, deceased, for damages for trespasses upon the lands of the plaintiff committed by the said C D within six months before his death

No 8

RECOVERY OF LAND AND ARREARS OF RENT

The plaintiff's claim is, as against all the defendants, to recover possession of No 34, High Street, Camden Town, N W, now in the occupation of the defendants A, B, and C, as sub-tenants of the defendant K, and also, as against the defendant K, for £—— arrears of rent due from him under the lease of the said premises granted him by the plaintiff, for damages for breach of the covenants to repair therein, for mesne profits, and for a receiver *

INDORSEMENTS FOR TRIAL WITHOUT PLEADINGS

(See *ante*, pp 39, 61)

(1) IN ACTIONS FOR BREACH OF CONTRACT

No 9.

BREACH OF PROMISE OF MARRIAGE

On December 27th, 1909, the plaintiff and defendant verbally promised to marry one another. On August 3rd, 1911, the defendant married another lady. And the plaintiff claims 1,000l damages.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No 10

GOODS OF INFERIOR QUALITY

The plaintiff's claim is for 60l damages for the defendant's breach of contract. On January 2nd, 1911, the defendant agreed

* If the property is sublet, it is as well to ask for the appointment of a receiver. See *Guathin v Bird*, 52 L J Q B 263

to sell and deliver to the plaintiff 100 sacks of flour of the kind known as "seconds" at thirty-five shillings a sack

The defendant duly delivered to the plaintiff 100 sacks in alleged compliance with his agreement. But the flour in them was not "seconds," but an inferior quality worth only twenty-three shillings a sack

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No. 11

MONEY HAD AND RECEIVED

The plaintiff's claim is, as executor of J S, deceased, for 172*l* 10*s*, money received by the defendant for the use of J S
Particulars.—

1911	£	s	d
January 3rd—To amount of rents of No 5, South Street, collected by the defendant - - -	72	10	0
February 6th—To deposit on intended sale of Elm Villa -	100	0	0
	<hr/> £172 10 0		

And for interest thereon at the rate of 5 per cent per annum till payment or judgment *

If the defendant appears, the plaintiff intends to proceed to trial without pleadings.

No 12

MONEY PAID BY DECEASED

The plaintiff is the executor of A B, deceased, A B in his lifetime became surety for the defendant to one C D, and, as such surety, was compelled to pay, and on June 29th, 1909, did pay, the sum of 1,051*l* 13*s* 4*d*, which the defendant owed to C D

* The claim for interest in this case, if maintainable at all, must be so under the statute 3 & 4 Will IV c 42, s 28, which enables a jury, "if they shall think fit," to award interest as damages. It is, therefore, unliquidated in amount, and cannot be specially indorsed. The plaintiff must prove at the trial that he or his testator made a written demand for payment on the defendant, and at the same time gave him notice in writing that interest would be claimed from the date of such demand until payment. See p 53

And the plaintiff claims —

(1) 1,051*l* 13*s* 4*d*

(11) Interest thereon at the rate of 5 per cent. per annum from June 29th, 1909, till payment or judgment.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings.

No 13.

NON-DELIVERY OF GOODS.

1. The plaintiff's claim is for 150*l* damages for the defendant's breach of contract in not delivering to the plaintiff 200 tons of Scotch pig iron, which the defendant had agreed to deliver to the plaintiff free on rail at Cardiff on or before March 15th, 1910.

2 The defendant has only delivered 80 tons of the said iron, and he did not deliver that quantity till June 13th, 1910

Particulars of damage —

	£	s.	d
Loss of profit on 120 tons at 1 <i>l</i> . per ton - - -	120	0	0
Loss by delay on 80 tons at 7 <i>s</i> 6 <i>d</i> per ton - - -	30	0	0
	<hr/>	<hr/>	<hr/>
	£150	0	0

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No 14

NON-REPAIR

The plaintiff's claim is for damages for the defendant's breaches of covenant in not repairing, and in not yielding up in proper repair, the house, No. 401, Piccadilly, W, which the plaintiff demised to the defendant by an indenture dated January 8th, 1901, which contains the covenants sued on

Particulars of dilapidations were left at the house for the defendant on January 14th, 1911, they exceed three folios

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No. 15

WRONGFUL DISMISSAL.

The plaintiff's claim is for damages for wrongful dismissal. On December 21st, 1909, the defendant engaged the plaintiff as

an electrical engineer for one year certain, beginning January 1st, 1910, at a salary of 300*l* per annum, payable quarterly. On February 19th, 1910, he discharged the plaintiff from his employment

The plaintiff also claims salary at the rate of 300*l* per annum from January 1st to February 19th, 1910

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

(11) IN ACTIONS OF TORT

No. 16

ANCIENT LIGHTS.

The plaintiff's claim is for an injunction to restrain the defendant from proceeding with the erection of a wall in such a way as to obstruct the ancient lights of the plaintiff's house, No 34, King Street, Colchester, in the county of Essex

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No. 17

COPYRIGHT

The plaintiff claims damages for the defendant's infringement of his copyright in a book entitled "Hints to Poultry-Fanciers," registered on April 12th, 1910

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No. 18

DETINUE

The plaintiff's claim is for the return of his horse, gig, and harness, which the defendant hired of him for the day on April 1st, 1911, but which he has never returned;

Or for 100*l* their value

And for 30*l* damages for their detention

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

74, and not 69 as therein stated, and the said policy is therefore void

7 The said policy was made on the life of the assured, for the use and benefit of one David Dawson, and not of the assured. But the name of the said David Dawson was not inserted in the said policy, as is required by sect. 2 of the statute 14 Geo III c 48, and the defendant company will therefore object that the said policy is illegal and void

8 The plaintiff is not the holder of the said policy. She is not entitled to receive the moneys, if any, which the defendant company may be liable to pay under the said policy.

No 84

RECTIFICATION OF AN AGREEMENT

DEFENCE AND COUNTERCLAIM.

✓ DEFENCE

1 The defendant admits that on May 22nd, 1909, he signed a written agreement with the plaintiffs. But the substance of such agreement is not correctly stated in paragraph 3 of the Statement of Claim. The defendant never agreed as in that paragraph alleged

2. The defendant contends that on the true construction of the said written agreement the plaintiffs are not entitled to be paid any moneys until the defendant has received from abroad the proceeds of the mines, either on sale or from workings, sufficient for such payment. The defendant has never yet received any such proceeds

COUNTERCLAIM

3 If, however, it should be held that the plaintiffs are entitled under the said agreement as written to be paid any moneys by the defendant before he had received from abroad proceeds of the said mines sufficient for such payment, the defendant counterclaims to have the said agreement rectified, and says that the verbal agreement between the plaintiffs and the defendant was that no moneys should be payable by defendant to plaintiffs until he had received proceeds of the mines sufficient for pay-

No 22

NEGLIGENCE BY A SOLICITOR

The plaintiff's claim is for 6*l* 12*s* 6*d* damage caused to the plaintiff by the defendant's negligence in his conduct of an action brought by the plaintiff against one C D, in which action the plaintiff had retained the defendant to act as his solicitor.

Particulars.

The negligence consisted in the defendant's making an application under Order XIV in the said action, though the plaintiff's claim was for unliquidated damages. The summons was dismissed with costs, and the plaintiff was ordered to pay, and has paid, to the said C D 6*l* 12*s* 6*d* for his taxed costs of the said summons.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings.

No 23

PERSONAL INJURIES

The plaintiff's claim is for 100*l* damages for personal injuries sustained by him in a collision near Box on May 9th, 1911, when he was travelling on the defendants' railway as a passenger from London to Bristol. Such injuries were caused by the defendants' negligence.

Particulars of Damage

	£	s	d.
Loss of 15 weeks' salary as clerk at 2 <i>l</i> per week -	-	30	0 0
Medical attendance - - - - -	-	10	10 0
Nurse for 6 weeks - - - - -	-	3	0 0
Extra nourishment - - - - -	-	2	10 0
		<hr/>	
	£46	0	0

If the defendants appear, the plaintiff intends to proceed to trial without pleadings

No 19

EXECUTOR SUING UNDER LORD CAMPBELL'S ACT

The plaintiff, as executor of C D, deceased, brings this action* for the benefit and on behalf of Eliza, the widow, and William, Margaret, and Mary, the children of C D [*as the case may be*], who have suffered damage from the defendants' negligence in carrying the said C D by omnibus, whereby the said C D was killed in Cornhill on the 15th January, 1911

And the plaintiff claims 500*l* damages

If the defendants appear, the plaintiff intends to proceed to trial without pleadings

No 20

MALICIOUS PROSECUTION

The defendant maliciously and without reasonable or probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, and caused the plaintiff to be sent for trial on the charge and imprisoned thereon, and prosecuted the plaintiff thereon at the Middlesex Quarter Sessions, where the plaintiff was acquitted

And the plaintiff claims 500*l* damages.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No. 21

MISREPRESENTATION

The plaintiff's claim is for 500*l* damages for the defendant's fraudulent misrepresentation. The defendant induced the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by representing to the plaintiff that the takings of the said public-house were 40*l* a week, whereas in fact they were much less, as the defendant was well aware.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings.

* It is submitted that an indorsement in the above form is a sufficient compliance with sect 4 of the Act, *ante*, p 181, if, indeed, that section applies at all where there are no pleadings

(iii) IN ACTIONS FOR THE RECOVERY OF LAND *

No 24

EJECTMENT OF TENANT FOR NON-PAYMENT OF RENT

The plaintiff's claim is to recover possession of the house and premises known as Nine Elms, South Tottenham, in the county of Middlesex, which the plaintiff demised to the defendant by a lease, dated June 27th, 1903, at a yearly rent of 300*l*, payable quarterly. The lease contained the usual covenants and a proviso for re-entry. The defendant has not paid the rent which accrued due either at Michaelmas or at Christmas, 1910.

And for 150*l* arrears of rent

And for mesne profits from Christmas, 1910, till judgment

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No 25

HEIR *v* TRESPASSER

The plaintiff's claim is to recover possession of the farm and premises known as Highfield, situate in the parish of White Lackington, in the county of Somerset, of which John Jones was seised in fee at the date of his death (November 23rd, 1910). The plaintiff is his eldest son and heir.

And for mesne profits at the rate of 200*l* a year, from November 23rd, 1910, till possession be given to the plaintiff.

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

No 26

REVERSIONER *v* PERSONS CLAIMING UNDER A TENANT FOR LIFE

The plaintiff's claim is to recover possession of the house known as 182, Piccadilly, W, of which the Rev John Roberts was seised in fee at the date of his death (April 17th, 1882). By his will dated February 3rd, 1878, he devised the said house to his daughter

* From 1852 to 1875 there were no pleadings in ejectment

Anne Roberts, for life, with remainder to the plaintiff in fee
 Anne Roberts died on October 3rd, 1911

And for mesne profits

And for an injunction [†]

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

(IV) IN THE CHANCERY DIVISION

No 27

PRIORITY OF MORTGAGEES [†]

By deed dated October 17th, 1906, certain property therein specified was mortgaged by the defendant A B to one J S By deed dated January 13th, 1909, J S transferred the said security to the plaintiff The defendant E F claims to be mortgagee of the said property in priority to the plaintiff. The defendant G H claims to be mortgagee thereof in priority both to the plaintiff and to the defendant E F

The plaintiff claims—

- (1) A declaration that he is first mortgagee of the said property in priority to the defendants E F. and G H
- (ii) Foreclosure or sale of the said property
- (iii) A receiver

If the defendants appear, the plaintiff intends to proceed to trial without pleadings

No 28

SPECIFIC PERFORMANCE

The plaintiff's claim is for specific performance of an agreement for the sale by the defendant to the plaintiff of the freehold hereditament known as Low Gill, Bredbury, near Stockport, in the county of Cheshire Such agreement is contained in three letters passing between the plaintiff and the defendant, and dated respectively October 27th, 29th, and 30th, 1910

* As to a claim for an injunction in an action for recovery of land, see *Read v Wotton*, (1893) 2 Ch. 171, 62 L. J. Ch 481, 41 W R 556, 68 L. T 209.

† A question of priority will not be dealt with on an originating summons (*In re Giles*, 43 Ch D 391, 59 L J Ch 226, 38 W R 273, 62 L T. 375); hence it is necessary to issue a writ, even in a simple case like that above

And for mesne profits from January 1st, 1911, the date fixed for completion, till possession be given to the plaintiff

Or in the alternative for damages

If the defendant appears, the plaintiff intends to proceed to trial without pleadings

INDORSEMENTS FOR AN ACCOUNT.

(Order III r 8; *ante*, p. 40)

No 29

CLAIM BY AN EXECUTOR

The plaintiff's claim is, as executor of A. B , deceased, for an account of all moneys received and paid by the defendant as the agent of A. B.

Particulars

1 On December 1st, 1906, A B. employed the defendant to collect the rents of his property, known as Beaconsfield Terrace, Walthamstow

2 The defendant collected the said rents from December 1st, 1906, till April 19th, 1911, he paid over to A. B certain moneys as and for the rents of the said property up to December 31st, 1909 He has made no payment since either to A B or to the plaintiff

3. A B. died on June 13th, 1910, having by his last will, dated March 5th, 1910, appointed the plaintiff his executor. Yet the defendant has refused to make any payment or render any account to the plaintiff

No 30.

CLAIM AGAINST AN AGENT

The plaintiffs' claim is for 932l , moneys had and received by the defendant as the plaintiffs' agent, on their behalf, and for their use, and also for an account of all moneys had and received by the defendant as such agent, and for payment of the amount found due on taking such account

No 31

MUTUAL DEALINGS

The plaintiff's claim is, as trustee in bankruptcy of one James Smith, for 640*l* 1*s*. 10*d*, money payable by the defendant to the plaintiff for goods sold and delivered by the said J. S. to the defendant, and for money received by the defendant to the use of the said J S, and for an account of all mutual dealings between the defendant and the said J S from May 3rd, 1907, up to the present time, and of all moneys received by the defendant from the said J S between these dates, and that the defendant may be ordered to pay to the plaintiff the amount found due to him on taking such account

[And see Precedents Nos 11, 46]

SPECIAL INDORSEMENTS

(*Being Statements of Claim to be indorsed on Writ under Order III r 6, ante, p 42.*)

No. 32

BILL OF EXCHANGE.

The plaintiff's claim is for 520*l* 11*s* 6*d*, for principal, interest, and notarial expenses, payable by the defendant to the plaintiff on a bill of exchange for 500*l*, dated January 1st, 1910, drawn by A. B on the defendant, and accepted by him, payable three months after date to the order of E. F, and indorsed by E F to the plaintiff

Particulars.

1910		£	s.	d
April 4th—Principal due	.	500	0	0
Interest	.	20	10	0
Noting	.	0	1	6
Total	.	£520	11	6

The plaintiff also claims interest on 500*l* of the above sum at 5*l* per cent. from date hereof until payment.

Signed.

[See *Lawrence & Sons v Willcocks*, (1892) 1 Q. B. 696, and *ante*, p 51.]

No 33

GOODS SOLD AND DELIVERED—ACCOUNT STATED

The plaintiff's claim is for 62*l* 15*s* 2*d*, balance of the price of goods sold and delivered by the plaintiff to the defendant

Particulars

	£	s	d
1910—December 31st—Butcher's meat supplied to this date .	55	12	8
1911—January 1st to March 31st—Butcher's meat supplied between these dates	15	13	0
<i>Ct.</i>	71	5	8
1911—March 31st—By cash	8	10	6
Balance due	£62	15	2

The plaintiff will also seek to recover the same amount as money payable by the defendant to the plaintiff on an account stated between them

Particulars

	£	s	d
1911—May 15th—Balance found to be due on an account stated in writing by the plaintiff and verbally agreed by the defendant to be correct this day .	62	15	2

Signed

No 34

GUARANTEE

[For a precedent of a special indorsement in an action on a guarantee, see *ante*, p 144]

No. 35

WORK AND LABOUR DONE.

The plaintiff's claim is for 313*l* 3*s* 11*d*, balance of an account for services rendered and work done by the plaintiffs as advertising agents and contractors for advertisements, in printing, posting, and advertising for the defendants, and also for moneys paid by the plaintiffs for the defendants at their request; of which full particulars have been delivered exceeding three folios in length.

Particulars

	£ s d.		
1910—April 18th to September 30th—To account rendered	408	19	11
<i>Ch</i>	£ s d		
1911—May 5th—By cheque on account	4	5	0
July 3rd—Goods shipped to plaintiffs' order at Ostend	116	0	0
	£ s d		
Less 10 per cent. discount	11	12	0
Freight and duty	12	17	0
	24	9	0
	91	11	0
	95	16	0
	£313 3 11		

Signed.

No 36.

ON A TRUST

The plaintiffs are the present trustees of a trust legacy of 2,750*l*, bequeathed by the will of John Brogden, deceased, to the defendants upon trust in favour of the testator's daughter Mary Jane Billing and her children. This legacy has remained unpaid by reason of a breach of trust on the part of the defendants and is now due from them upon a trust. And the plaintiffs' claim is to have this legacy paid to them by the defendants, together with interest thereon from the 12th day of April, 1885, payment of such interest being directed by the testator in his will at the rate of four per cent. per annum. The defendants have admitted that assets have come to their hands sufficient to answer the said legacy and interest.

Particulars

	£ s d.		
1885—April 12—Principal of legacy	2,750	0	0
1890—March 18—Interest thereon from 12th April, 1885, to this day at four per cent. less income tax	526	12	9
	£3,276 12 9		

Signed.[See *Hamilton v Brogden*, 60 L J Ch. 88.]

Other forms applicable to cases under heads A., B, C., D., and E., of Order III r. 6, are given in R. S. C., Appendix C., sect. IV.

No. 37.

[Under Order III r 6 (F)]

STATEMENT OF CLAIM TO BE INDORSED ON WRIT IN AN ACTION
FOR THE RECOVERY OF LAND WHERE THE TERM HAS EXPIRED

(a) WHERE THERE IS AN AGREEMENT IN WRITING

The plaintiff's claim is to recover possession of two fields situate at Waxham, in the parish and manor of Horsey, in the county of Norfolk, numbered 491 and 492 in the Tithe Apportionment Map, which were demised by the plaintiff to the defendant by an agreement in writing bearing date September 17th, 1904, for a term which expired on September 29th, 1911

The plaintiff also claims mesne profits from September 29th, 1911, till possession of the said fields is delivered up to him.*

Signed

No 38

(b) TENANCY AT WILL

1 The plaintiff's claim is to recover possession of certain premises situate in the parish of M, in the manor of N, in the county of S, and known as Hepthorp Farm, and for mesne profits from December 23rd, 1910

2 The defendant was tenant at will to the plaintiff of the said premises, but the plaintiff on December 23rd, 1910, duly determined such tenancy and demanded possession of the said premises, yet the defendant refuses to deliver up possession thereof to the plaintiff

Signed

[See Precedents Nos 102 and 111]

No 39

STATEMENT OF CLAIM TO BE INDORSED ON WRIT IN AN ACTION
FOR THE RECOVERY OF LAND WHERE THE TENANCY HAS
BEEN DULY DETERMINED BY A PROPER NOTICE TO QUIT

1. The plaintiff's claim is to recover possession of certain premises known as Laurel Cottage, St. Anne's Churchyard, in the borough of Petersfield, in the county of Southampton.

* The plaintiff is entitled to have the mesne profits in this action calculated up to the date of his obtaining possession of the land (*Southport Tramways Co. v. Gandy*, (1897) 2 Q B 66, 66 L. J Q B. 532, 76 L. T. 815)

II—SUMMONSES AND ORDERS

No 40

GENERAL FORM OF ORIGINATING SUMMONS.

(Order LIV. r 4B; Appendix K, No 1A)

1911 [*Here put the letter and number*]

In the High Court of Justice,

King's Bench Division,

Between A B

Plaintiff,

and

C D

Defendant.

Let C D of —, in the county of —, within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons which is issued upon the application of the plaintiff, who resides at —, in the county of —, and who claims to be entitled to compound interest under a promissory note made by the defendant in the following words —[*here set out a full copy of the note*], for the determination of the following question —Whether the said note carries simple or compound interest?

Dated the — day of —, 1911.

This summons was taken out by E F, of —, solicitor for the above-named plaintiff.

The defendant may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice.

NOTE —If the defendant does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the judge may think just and expedient.

No. 41.

SUMMONS UNDER ORDER XIV.

[Heading as in Precedent No 40.]

Upon reading the affidavit of A. B.

Let all parties concerned attend the Master in Chambers, Central Office, Royal Courts of Justice, Strand, London, on Thursday, the

2 The defendant occupied the said premises as a weekly tenant to the plaintiff on the terms that such tenancy should be determinable by a four weeks' notice to quit to be given by either party

3 The plaintiff duly determined the said tenancy by serving on the defendant, on October 7th, 1911, a notice to quit the said premises on the following November 8th, 1911, yet the defendant refuses to deliver up possession thereof to the plaintiff

4. The plaintiff also claims the mesne profits of the said premises from the said November 8th, 1911, till possession be delivered up

Signed

[See another precedent in *Daubuz v Lavington*, 13 Q B D 347, 53 L J Q B 283, 32 W R 772, 51 L T 206
See, also, *Hammer v Clifton*, (1894) 1 Q B 238, 42 W R 287]

For the form of Statement of Claim to be indorsed on the writ where a tenant has incurred a forfeiture through not paying his rent, see Precedent No 72, *post*, p 430.

23rd day of November, 1911, at 1 30 o'clock in the afternoon, on the hearing of an application on the part of the plaintiffs, that they be at liberty to sign final judgment in this action against the defendant for the amount indorsed on the writ, with interest, if any, and costs

This summons will be attended by Counsel

Dated the 18th day of November, 1911

No 42

ORDER UNDER ORDER XIV

[Heading as in Precedent No 40.]

Upon hearing Counsel for plaintiffs and defendant, and upon reading the affidavits of A B and C D, both filed the 23rd day of November, 1911—

It is Ordered that the plaintiffs may sign final judgment in this action for the amount indorsed on the writ, with interest, if any, and costs to be taxed

Or,

It is Ordered that, if the defendant pay into Court within a week from the date of this order the sum of 200*l*, he be at liberty to defend this action, but that if that sum be not so paid, the plaintiffs be at liberty to sign final judgment for the amount indorsed on the writ of summons, with interest, if any, and costs.

Or,

It is Ordered that the defendant be at liberty to defend this action, and that it be placed in the short cause list.

Fit for Counsel.

And that the costs of this application be costs in the cause

Dated the 23rd day of November, 1911

No 43

SUMMONS FOR DIRECTIONS.

Under Order XXX.

[Heading as in Precedent No. 40]

Let all the parties concerned attend Master *Archibald* in Chambers, at the Central Office, Royal Courts of Justice, Strand, London, on *Monday*, the 16th day of *January*, 1911, at 1.30 o'clock

ment of the same The plaintiffs acted as solicitors for both parties in the matter, and prepared the said written agreement as a record of the said verbal agreement, and the defendant signed the said agreement in the belief, and on the faith of a representation made by the plaintiffs, that it contained the terms of the said verbal agreement, and that no money would become payable by him to the plaintiffs thereunder until he had received proceeds of the mines sufficient for such payment

The defendant counterclaims to have the said agreement rectified

[See Precedent No 110]

No 85

RESCISSION OF A CONTRACT—ACCORD AND SATISFACTION

1 The defendant admits that he entered into a contract with the plaintiffs on June 11th, 1910, and that the purport thereof is correctly stated in paragraph 1 of the Statement of Claim But prior to August 20th, 1910, and before any breach by defendant of the said contract, the plaintiffs and defendant mutually agreed to rescind the said contract, and to substitute a fresh agreement therefor.

2 The terms of the said substituted agreement were reduced to writing on August 20th, 1910, and signed by the defendant, and the defendant thereby agreed to pay to the plaintiffs 300*l*. in cash, and also to give them four promissory notes for the remainder of the said purchase-money, and the plaintiffs agreed to accept the said cash and notes in full satisfaction and discharge of their rights under the said contract.

3. On August 27th, 1910, the defendant paid the plaintiffs the sum of 300*l* , and handed to them the said notes, and the said cash and notes respectively were accepted by the plaintiffs as the due performance and in full satisfaction and discharge of the said agreement of August 20th The said notes are still outstanding.

4 The defendant admits that he paid the sum of 300*l* to the plaintiffs, but denies that he did so in pursuance of the said contract of June 11th. Such payment was made in performance of the said agreement of August 20th

No 86

WORK AND LABOUR DONE AND MATERIALS SUPPLIED—INTEREST

1. The plaintiff never did any of the work or labour, or provided any of the materials, specified in the Statement of Claim.

2 None of the said work or labour was done, nor were any of the said materials supplied, for or to the defendant or at his request

3. The defendant never agreed to pay the plaintiff the prices charged for the said work, labour and materials, or any other prices The prices charged by the plaintiff are unreasonable and exorbitant

4 The defendant never agreed to pay the plaintiff any interest on the sum of 217*l* 3*s* 4*d* , or on any other sum

5 The defendant will object that no facts are disclosed in the Statement of Claim which entitles the plaintiff to any interest.

No 87

POINTS OF DEFENCE IN A COMMERCIAL CASE

(Defence to No 60)

1. The lay days did not begin till June 10th, 1911, when the ship got into a loading berth in the Avonmouth Dock, and expired on June 20th

(11) IN ACTIONS OF TORT

No 88

FRAUDULENT MISREPRESENTATION

1. Neither defendant ever made any of the representations alleged in the Statement of Claim

2 No one of the said alleged representations was false in fact, no one of them was false to the knowledge of either of the defendants, no one of them was made fraudulently or recklessly or without caring whether the same was true or false

3 The plaintiff was not induced by any of the alleged repre-

sentations to buy the goodwill, tenancy, and licence of the Duke of York Tavern. The plaintiff ascertained for himself the value and extent of the business done at the said tavern, and the class of customers using the same. He himself examined the books and visited the said tavern before he agreed to purchase the same, and he made the said purchase in reliance upon his own judgment and the result of his own inquiries and investigations, and not upon any statement or representation made by the defendants or either of them.

4. The plaintiff has not suffered the alleged or any damage by reason of any act or default of either of the defendants. The defendants will object that the damage claimed is too remote.

No. 89

INFRINGEMENT OF COPYRIGHT

1. The plaintiff is not the author of the so-called chart.
2. The plaintiff did not after publication, or at any other time, register the said chart at Stationers' Hall.
3. The registration, if any, is invalid.
4. The said chart is not the subject of copyright.
5. The defendant has not infringed the plaintiff's copyright, if any.
6. Notice of objections is delivered herewith, pursuant to the statute 5 & 6 Vict. c. 45, s. 16.

No. 90.

NOTICE OF OBJECTIONS.

(Delivered with the Defence pursuant to the statute 5 & 6 Vict c. 45, s. 16.)

The following are the objections upon which the defendant intends to rely:—

1. The so-called chart is not an original work of the plaintiff's; he is not the first author or inventor of it. Similar charts showing the results of the May races have been published in Cambridge every May Term since 1853.

2. The so-called chart is not the subject of copyright. It is not a literary composition. It is merely a pictorial method of

stating certain items of news about the boat-races which were already common property

3 The so-called chart was never duly entered or registered at Stationers' Hall as required by statute, and the plaintiff can maintain no action for infringement of copyright in respect thereof, inasmuch as—

- (a) The registration, if made, was made before the publication of the said chart, viz, on May 21st, 1910
- (b) The said chart was first published on May 24th, 1910, and not on May 21st, 1910, which is wrongly entered as the date of first publication in the registry book of the Stationers' Company

No 91

INFRINGEMENT OF A PATENT

(Defence to No 63)

- 1 The defendants have not infringed any letters patent
- 2 The said alleged invention is not new
- 3 The said alleged invention is not the proper subject-matter of letters patent
- 4 The plaintiff is not the first and true inventor of the said alleged invention
- 5 The said alleged invention is not useful
- 6 The plaintiff's final specification describes and claims an invention larger than and different from the invention the nature of which is disclosed in the provisional specification
- 7 Particulars of objections are delivered herewith, pursuant to Order LIIIA r 14.

No 92

PARTICULARS OF OBJECTIONS

(Delivered with the Defence pursuant to Order LIIIA. r 14)

The following are the particulars of the objections upon which the defendants intend to rely

- 1 The plaintiff is not the first and true inventor of the said alleged invention.

2 The said alleged invention is not new

(1) The said alleged invention had been published in this realm prior to the date of the said letters patent in the specifications of the following patents —

(a) Brown and Singleton, No 9815 of 1865

(b) Orme, No 3964 of 1877

(c) Gray and Tunmcliffe, No 982 of 1886

The defendants rely on *lines 10—17 on page 2 of (a), on lines 8—12 of page 3 of (b), and on the whole of (c), as anticipating the second and third claims in the specification of the plaintiff's letters patent

(11) The said alleged invention claimed in the first claim of the specification of the plaintiff's letters patent, had, prior to the date of the said letters patent, been published in this realm in the following books.—

(d) "Light and Heat," by Joseph Addison, published in 1891 by Macmillan & Co, of St. Martin's Street, W.C.

The parts relied on are the descriptive matter on page 12 and the illustrated designs No 6 on page 13, and No. 128 on page 92.

[Specify all other publications on which the defendants rely, giving in each case the name of the book and of the author, and the name and address of the publisher.]

(111) The said alleged invention claimed in the first claim in the specification of the plaintiff's letters patent had been published in this realm prior to the date of the said letters patent by the manufacture, use and sale of [*specify anticipatory articles*] by the several persons, at the several places, and at the several dates, hereinafter set out:—

(e) By A. B. [*name of prior user*] of [*address where user took place*] for the past six years and their predecessors in business [*name of predecessor*] for many years previously

(f) C D. of ——— for the past nine years.

(g) The said alleged inventions claimed in the second and third claims of the specification of the plaintiff's letters patent have also been anticipated by the common general use of the trade for many years prior to the date of the plaintiff's letters patent.

* Lines and pages must be specified, if special portions be relied on.

3. The said alleged invention is not the subject-matter of letters patent.

The defendants intend to rely hereunder upon all prior publications set out in the preceding paragraphs, and to allege that in none of the claims in the plaintiff's letters patent is there any patentable improvement upon existing prior knowledge

4 The final specification of the plaintiff's letters patent describes and claims in its second and third claims inventions which are not included, and the nature of which is not defined, in the provisional specification

No 93

LIABILITY OF A LIGHTERMAN

(Defence to No 65)

1 The defendants at all dates mentioned in the Statement of Claim were and now are warehousemen and wharfingers, but they were not and are not lightermen as alleged, and did not enter into any contract as such

2 The defendants never agreed to tranship or carry, or to land or warehouse, any of the goods mentioned in the Statement of Claim upon the terms therein alleged, or for reward, or at all.

3. The defendants deny each and every allegation contained in paragraphs 3, 4, and 6 of the Statement of Claim.

4. The defendants did not, nor did their servants or agents, negligently or carelessly navigate, moor, or keep the said lighter, or do any act, or omit anything, which caused damage to the plaintiff.

5 If the said goods were shipped on board the said lighter, she was at such time tight, staunch and strong, and in every way suitable and reasonably fit for the loading and carriage of the said goods But the defendants never warranted, as alleged in paragraph 5 of the Statement of Claim, or at all. No damage was caused to any of the said goods by reason of the breach of any warranty

6. Alternatively, the defendants say that if they agreed to tranship and carry the said goods for reward or at all, or if they shipped any of the plaintiff's goods on board the said lighter, they did so upon the terms that they should not be liable for any

loss or damage to the said goods, except loss or damage arising from the negligence or wilful acts of themselves or their servants, and that the alleged loss or damage was not so caused

No 94

LIBEL

1. The defendants are the proprietors of a weekly newspaper called the "Stock Exchange."

2. The defendants admit that they printed and published in their said newspaper the words set out in paragraph 3 of the Statement of Claim, but deny that they did so with any of the meanings in the said paragraph alleged. The said words are incapable of the said alleged meanings or any other defamatory or actionable meaning.

3. The said words without the said alleged meanings are no libel.

4. The said words are part of a fair and accurate report of a judicial proceeding, viz., an action tried before Mr Justice ——— in ———, in which A. B. was plaintiff and C. D. defendant, and were published by the defendants *bonâ fide* for the information of the public, and in the usual course of their business as public journalists, and without any malice towards the plaintiff, and are heretofore privileged.

5. The said words are fair and *bonâ fide* comment on matters of public interest, namely, the said judicial proceeding and the promotion and registration of the J. B. E. Co., and were published by the defendants *bonâ fide* for the benefit of the public and without any malice towards the plaintiff.

6. The said words without the said alleged meanings and according to their natural and ordinary signification are true in substance and in fact.

No. 95

LIBEL

1. The defendant admits that he printed and published in his newspaper the words set out in paragraph 2 of the Statement of Claim, but he denies that he published them with any of the

meanings in the said paragraph alleged, or with any defamatory meaning

2 In so far as the said words consist of allegations of fact, they are true in substance and in fact, in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest *

No 96

LIBEL—APOLOGY AND PAYMENT INTO COURT

The defendant admits that she wrote and published the words set out in paragraph 2 of the Statement of Claim. She denies that they bear the meanings alleged in the said paragraph, but she admits that they are libellous in their natural signification, and that they refer to the plaintiff. She has, since action brought, tendered to the plaintiff a full apology for her publication of the said words, and has also offered to pay a sum of money to the plaintiff for damages and costs. And the defendant now repeats such apology, and expresses her sincere regret for such publication. She unreservedly withdraws all imputation on the plaintiff's character, and brings into Court the sum of 5*l* 5*s*, and says that the same, together with such apology, is sufficient to satisfy the plaintiff's claim in this action in respect of the said words without the said alleged meanings, which are denied.

[N B — *A defendant may deny the innuendo and yet pay money into Court, provided it is made clear that the money is paid into Court, in respect of the words without the innuendo, which is denied. Mackay v Manchester Press Co*, 54 J. P. 22, 6 *Times L. R.* 16, ante, p. 228.]

* This form of pleading was approved by the Divisional Court in *Lord Penrhyn v. The Licensed Victuallers' Mutual*, 7 *Times L. R.* 1 (Mathew and Grantham, JJ.)

No. 97.

LIBEL—NOTICE IN MITIGATION OF DAMAGES.

*Particulars**(Delivered pursuant to Order XXXVI r 37)*

Take notice, that at the trial of this action the defendant intends to give the following matters in evidence with a view to mitigation of damages —

1 On August 10th, 1910, before the publication of the letter set out in paragraph 4 of the Statement of Claim, the plaintiff wrote and caused to be printed and published in the ——— *County Gazette* an anonymous letter with regard to the matters mentioned in paragraph 2 of the Statement of Claim, in which he commended his own conduct, and then referred to the defendant in the following words —

[Set out so much of the anonymous letter as attacked the defendant.]

2 It was in reply to the attack made on the defendant by this anonymous letter that the defendant wrote the words set out in paragraph 4 of the Statement of Claim, which the plaintiff alleges to be a libel upon him

Dated the ——— day of ———, 1911.

Yours, &c.,

A. B., of ———,
Defendant's Solicitor.

To the Plaintiff, and
Messrs. C. and D.,
his Solicitors or Agents.

No. 98.

REPLEVIN—RENT IN ARREAR

The plaintiff held, and still holds, the said premises as tenant to one J. S., at the yearly rent of 300*l.*, payable quarterly. On August 7th, 1911, 150*l.* of the said rent was and still is due and in arrear from the plaintiff to the said J. S., who thereupon appointed the defendant his bailiff to distrain on the goods upon

the said premises for the said arrears of rent And the defendant accordingly took the goods mentioned in the plaintiff's particulars as a distress for the said rent

No 99

REPLEVIN—CATTLE DAMAGE FEASANT

On July 8th, 1911, the defendant was in occupation of a certain field as tenant to Sir J H , and the said cattle were wrongfully straying in the said field, and doing damage there, wherefore the defendant distrained them in the said field.

No 100

SLANDER.

1 The defendant never spoke or published any of the words set out in paragraph 2 of the Statement of Claim.

2 The defendant never spoke or published the said words with the meaning in the said paragraph alleged The said words are incapable of the said meaning or of any other defamatory or actionable meaning

3 The defendant never spoke or published the said words of the plaintiff in relation to his trade, &c. [*Follow the exact words of the Statement of Claim*] The plaintiff is not a ———

4 The defendant will object that the said words are not actionable without proof of special damage, and that none is alleged (or, and that the special damage alleged is too remote and is not sufficient in law to sustain the action)

No. 101

SLANDER—VULGAR ABUSE.

1 The defendant admits that he spoke and published the words set out in paragraphs 2 and 3 of the Statement of Claim, but denies that he spoke or published them with the meanings in the said paragraphs alleged.

2. The said words are merely vulgar abuse, and were uttered by the defendant in anger, as all who heard the words were well aware; they were not intended or understood to convey any specific charge or imputation against the plaintiff.

3 The said words are incapable of any of the said meanings, or of any other actionable or defamatory meaning

4. The defendant will object that the said words (taken either by themselves or with any innuendo of which they are capable) are not actionable without proof of special damage, and that none is alleged

(111) IN AN ACTION FOR THE RECOVERY OF LAND

No. 102

EJECTMENT OF A TENANT.

(Defence and Counterclaim to No 38)

1 The defendant is in possession of the premises mentioned in the Statement of Claim.

2 The defendant denies that he ever was tenant at will to the plaintiff of the said premises But before the determination of such tenancy, if any, the plaintiff, by writing dated October 3rd, 1908, agreed to grant* to the defendant a lease of the said premises at the yearly rent of 120*l* for the term of twenty-one years, commencing December 25th, 1908, and on that date the defendant's tenancy at will, if any, determined, and he has since that date been and still is in possession of the said premises under the said agreement

And the defendant counterclaims to have the said agreement specifically performed, and to have a lease granted to him in accordance therewith.

[See Precedent No 111.]

* This must be specially pleaded although the defendant is in possession, because it is a purely equitable defence. See *ante*, p. 218.

(iv) NOTICES OF SPECIAL DEFENCES IN ACTIONS FOR TRIAL
WITHOUT PLEADINGS

[Although pleadings may have been dispensed with, it is still in some cases necessary in these actions for the defendant to give notice of certain defences (Order XVIIIa r 5, *ante*, p 63) Such notice may be in the following form.—]

No 103

NOTICE OF SET-OFF OR COUNTERCLAIM.

(*Heading in the Action*)

Take notice that the defendant intends at the hearing of this action to claim a set-off [or (*and*) to set up a counterclaim] on the following grounds —

1 [State the nature of the cross-claim]

2

Particulars.

A. B.,

Defendant's Solicitor.

Dated this ——— day of ———, 19 .

To the Plaintiff, or

Messrs X and Y.,

his Solicitors

NOTICE OF SPECIAL DEFENCE.

Take notice that the defendant intends at the hearing of this action to give in evidence and rely upon the following ground of defence:—

No. 104.

INFANCY.

The defendant was an infant within the age of twenty-one years when the alleged contract [or promise] was made. He was born at ———, in the county of ———, on ———.

No 105

COVERTURE

The defendant is now [or, she was, at the time when the supposed claim arose, or the supposed contract or agreement was made] the wife of — — —, of — — —. She was married to him at — — —, in the county of — — —, on the — — — day of — — —. He resides at — — —, in the county of — — —.

No 106

FRAUD.

The defendant was induced to make the alleged promise [or agreement, or to accept, or endorse the said bill of exchange, or to make the said promissory note, or to execute the alleged deed, or to contract the alleged debt] by the fraud of the plaintiff, of which the following are the particulars:—

[Here add particulars of the alleged fraud.]

No 107

STATUTE OF LIMITATIONS.

The plaintiff's claim is barred by the Statute of Limitations (21 Jac I. c 16) [or, if a specialty debt, 3 & 4 Will IV c 42, or, in an action for the recovery of land, by the Real Property Limitation Act,* 1874].

No. 108.

BANKRUPTCY OR COMPOSITION

The defendant is a discharged bankrupt. He obtained his order of discharge from the [name the Court] on the — — — day of — — —.

* As there are no pleadings, Order XXI. r. 21, does not apply

Or,

The defendant was discharged by composition or scheme of arrangement pursuant to sect 18 of the Bankruptcy Act, 1883, on the ——— day of ———

A B ,
Defendant's Solicitor.

Dated the ——— day of ———, 19—

To the Plaintiff, or

 Messrs. X and Y ,
 his Solicitors.

V —REPLIES, &c

No 109

GOODS SOLD AND DELIVERED—NOT EQUAL TO SAMPLE

(Reply and Defence to Counterclaim No 82)

1 The plaintiff admits that the defendants have paid 44*l* to the plaintiff's solicitors, and have brought ———*l* into Court as alleged. Save as aforesaid, he joins issue with the defendants upon their Defence.

2 In answer to the Counterclaim, the plaintiff denies that the said barley was sold by sample as alleged. All the said barley was bought by the defendants in bulk after inspecting the same upon the plaintiff's premises. The plaintiff never warranted or undertook that it was equal to any sample or was or should be properly screened or well-managed.

3 If the said sale was by sample, which the plaintiff denies, the said barley was equal to the sample, and was properly screened and well-managed.

No. 110

RECTIFICATION OF AN AGREEMENT

(Reply and Defence to Counterclaim No 84)

1. The plaintiffs join issue with the defendant on his Defence.

2. As to the Counterclaim, the plaintiffs will object that on the facts therein alleged the defendant is not entitled to have the said agreement rectified.

3. The plaintiffs never agreed as alleged. The said written agreement truly represents, and contains, and is, the only agreement made between the plaintiffs and the defendant, as the defendant always well knew.

4. The plaintiffs never represented as alleged. They made no representation at all with regard to the terms of the said written

agreement, nor was the said written agreement prepared as a record of any verbal agreement. The defendant read over the said written agreement, assented to it, and signed it of his own free will, and not in the belief or on the faith of any representation by the plaintiffs or either of them.

5 The plaintiffs will object that parol evidence is inadmissible to vary the said written agreement, and will also rely on sect 4 of the Statute of Frauds.

No 111

EJECTMENT OF A TENANT

(Reply and Defence to Counterclaim No 102)

1 The plaintiff joins issue with the defendant upon his Defence.

2 And as to the Counterclaim, the plaintiff denies that he ever agreed as therein alleged.

3 There is no memorandum of any such agreement sufficient to satisfy the Statute of Frauds.

4 If the plaintiff ever agreed to grant the defendant a lease of the said premises, which he denies, such agreement provides that the lease should contain a condition by which it would determine if the defendant became bankrupt. The defendant was adjudicated a bankrupt on December 23rd, 1908.*

No 112

REJOINDER

1 The defendant joins issue with the plaintiff on paragraphs 2, 3, and 4 of his Defence to the Counterclaim.

2 And in further answer to paragraph 3 thereof, the defendant says [*here set out the facts on which the defendant relies, as amounting to part performance*].

* The defendant's bankruptcy affords a good defence to the Counterclaim because a Court of equity will not decree specific performance of an agreement to grant a lease in cases where it would be useless to do so. Here, if the Court ordered a lease to be granted, the plaintiff could at once forfeit it and re-enter by reason of the bankruptcy. And sect 14 of the Conveyancing Act, 1881, does not apply to such a case.

VI—DISCOVERY

No. 113

AFFIDAVIT AS TO DOCUMENTS

(Heading similar to that in Precedent No 1)

I, John Jones of ———, in the county of ———, the above-named defendant, make oath and say as follows —

1 I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the First Schedule hereto

2 I object to produce any of the documents which are tied up in the bundle marked A mentioned in the second part of the First Schedule hereto, on the ground that they all relate solely to my case and do not relate to the plaintiff's case or tend to support it, or to impeach my case, wherefore I say they are privileged from production *

3 I also object to produce the analysis and report mentioned in the second part of the First Schedule hereto, on the ground that it was made and came into existence for the use of my solicitor in this action, and as evidence and information as to how evidence could be obtained, and otherwise for the use of the said solicitor to enable him to conduct my defence in this action, and to advise me in reference thereto. It was prepared by the direction of my solicitor for his own use in anticipation of litigation and in the conduct of this action, and for no other purpose whatever, wherefore I say that it is privileged from production †

* This was held a sufficient claim of privilege in *Budden v Wilkinson*, (1893) 2 Q B 432, *Frankenstein v Gavan*, (1897) 2 Q B 62, and in *Milbank v Milbank*, (1900) 1 Ch 376. In an action for recovery of land, or for a declaration of title, the defendant may omit the statement that the documents do not impeach his case (*Morris v Edwards*, 15 App Cas 309, *At Gen v Newcastle-upon-Tyne*, (1899) 2 Q B. 478).

† This was held sufficient in *Collins v London General Omnibus Co*, 63 L J Q B 428, 68 L T. 831.

4 I object to produce all the other documents set forth in the second part of the First Schedule hereto, on the ground that they are privileged. They consist of professional communications of a confidential character made to me by my legal advisers for the purpose of giving me legal advice, cases for the opinion of counsel, opinions of counsel and instructions to counsel prepared and given in anticipation of and during the progress of this action, letters and copies of letters passing between me and my solicitor and between my solicitor and third persons either in anticipation of or during this action, and drafts and memoranda made by my counsel and solicitor for the purpose of this action.

5 I have had, but have not now, in my possession or power the documents relating to the matters in question in this action set forth in the Second Schedule hereto.

6. The last-mentioned documents were last in my possession in the month of October, 1910, when I forwarded the first of them (No 38) to the plaintiff, and the remaining three to the Editor of *The —— Observer*.

7 According to the best of my knowledge, information and belief, I have not now, and never have had, in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from, any such document or any other document whatsoever, relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said First and Second Schedules hereto.

FIRST SCHEDULE

PART I

ORIGINALS.

- 1 Letter from plaintiff to defendant, dated January 21st, 1910.
- 2 Letter from plaintiff's solicitor to defendant, dated June 6th, 1910.
- 3 Letter from plaintiff to defendant, dated October 6th, 1910.
- 4 *The —— Observer*, issue for October 13th, 1910.

COPIES.

- 5 Letter from defendant to plaintiff, dated October 4th, 1910
 6 Inventory and valuation made by John Smith, on October 30th, 1910
 7
 8

PART II

- 9—36 Certain documents, numbered 9 to 36 inclusive, which are tied up in a bundle marked A and initialled by the deponent John Jones *
 37 An analysis and report made by Professor — on or about November 23rd, 1910, and forwarded by him to my solicitor on November 24th, 1910, for his use in this action

Cases for the opinion of counsel, opinions of counsel and instructions to counsel prepared and given in anticipation of and during the progress of this action

SECOND SCHEDULE

- 38 Letter written and sent by me to the plaintiff on October 4th, 1910
 39 Copy of same.
 40 Copy reply of the plaintiff to that letter dated October 6th, 1910
 41 Letter written and sent by me to the editor of *The ——— Observer* on October 8th, 1910, with the two copies just mentioned, all three of which were inserted by him in the issue of that paper for October 13th, 1910

Sworn by the above-named John Jones, at 1.
 Clement's Inn, Strand, in the County of } John Jones
 Middlesex, this 17th day of May, 1911, }

Before me,

W A S

A Commissioner to administer Oaths in the Supreme
 Court of Judicature in England

No 114

INTERROGATORIES IN AN ACTION FOR DILAPIDATIONS

1 Do you allege that the premises mentioned in the Statement of Claim are now in good and tenantable repair? If nay, set out

* Any description is sufficient which identifies the documents sufficiently to enable the Court to enforce production, if it should see fit to order it (*Taylor v Batten*, 4 Q B D 85, *Beuche v Graham*, 7 Q B D. 400, *Morris v. Edwards*, 15 App Cas 309, *Budden v Wilkinson*, (1893) 2 Q B 432, and *Milbank v Milbank*, (1900) 1 Ch 376)

a full list of all defects of repair which you admit now exist Do you allege that any and which of such defects existed at the date of the demise of the said premises to you?

2 Is not Mr A inspector of nuisances for the borough of T? Did he not visit and inspect the premises, and when? Did he not report thereon? If yea, identify the document Is not every statement of fact contained in that report true? If nay, specify every statement therein contained of which you dispute the accuracy, and state what you allege were the true facts in that behalf

No 115

INTERROGATORIES IN AN ACTION FOR GOODS SOLD AND DELIVERED TO A FARMER

1 Is not Mr. J. B Falding your farm bailiff? Is he not your agent for the management of — — Farm? Is he not authorised to purchase goods, and to order work and labour to be done when the same are necessary for the said farm? If nay, state what his authority and position are

2 Were not all or some, and which, of the goods mentioned in the particulars delivered herein ordered of the plaintiffs by the said J B Falding in the month of September, 1910, by word of mouth? If nay, state when and where and by whom and on whose behalf the said goods were ordered, and whether verbally or by letter If verbally, state the terms of the said order. If by letter, identify the document

3 Were not the said goods delivered at the said farm? If nay, state which of the said goods you say were not delivered there Have you not seen the said goods, or some and which of them, on your said farm? Have not the said goods, or some and which of them, been used and consumed on the said farm? If nay, state to the best of your knowledge, information, and belief, where each of the said goods now is

4 Are not the prices charged by the plaintiffs for the said goods fair and reasonable? Which of the said prices do you allege to be exorbitant? Specify in each case what sum you would deem a proper and reasonable price

5 Do you allege that any price was agreed for any and which

of the said goods? Which of the prices charged by the plaintiffs do you allege to be in excess of the agreed price? If any, state precisely what price was agreed for each item, and when and where and between whom such agreement was made, and whether verbally or in writing. If verbally, give the substance of it; if in writing, identify the document.

No 116

INTERROGATORIES SETTING UP THAT THE GOODS WERE SUPPLIED TO
DEFENDANT AS AGENT ONLY FOR OTHERS.

1 Were not the goods, the subject-matter of this action, bought of you by X, Y, and Z, or some one or more and which of them? Were not the said goods supplied by you entirely for their use and benefit, and not at all for the use and benefit of the defendant?

2 Were not the said goods supplied for use in or upon certain brick-making works at Swindon? Who was then the owner of the said works, and who was then the occupier? Were you not then aware that the defendant was neither the owner nor occupier of the said brick-making works?

3. Were not the said goods ordered and bought of you, and were you not requested to deliver the same at the said brick-making works by the said X, Y., and Z, or some one or more and which of them, or by some one, and whom, for the use and on the account of one or all of them? If nay, who gave you the said orders, and who requested you to supply the said goods, and when?

4 If you say the defendant gave the said orders, and made the said request, did he not then expressly tell you that he was the servant or agent of the said X, Y., and Z., or some one or more of them, and that he was acting in that capacity in giving the said orders and making the said request, and not otherwise? If nay, for whom did he state that he was acting? Did he not tell you that he was not acting on his own behalf, but as an agent for some principal?

5. Did you not know, at the time you received the said orders, that the defendant was then the servant or agent of the said X., Y., and Z., or some one or more of them, and that he was not then acting in his own behalf, but on behalf of some principal?

6. Did you not charge the price of the said goods to the said X , Y , and Z , or to some one or more and which of them? Did you not give them, or some one or more and which of them, credit for the same?

7. Have you not applied to the said X , Y , and Z , or to some one or more and which of them, for payment for the same? Did you not prove against the estate of X for the amount of your claim in this action? Did you not attend and vote at a meeting of his creditors held on July 2nd, 1910, or on some other and what day?

8 Did not the said Y give you a bill of exchange for 60l , or some other and what amount, as part payment for the said goods for which you are now suing the defendant? Did not the said Z give you a bill of exchange for the full amount which you now claim from the defendant? Did you not accept the same in full satisfaction and discharge of your present claim? If nay, what was the consideration therefor?

No 117

INTERROGATORIES IN AN ACTION BROUGHT AGAINST THE EDITOR OF
A NEWSPAPER WHO HAS PUBLISHED AN ANONYMOUS LETTER
SIGNED "A RATEPAYER "

1 On what day did you receive the letter signed "A Ratepayer," which is the subject of this action? How long was it after the receipt of the said letter that you published the same in your paper?

2. Was the said letter sent to you anonymously? Or was there anything, and what, sent with the said letter to show you who wrote it, or from whom it came?

3. Who delivered the said letter at your office? Who received it? Did you yourself see the person who brought it? If nay, who did? How long had the said letter been in your office when you first saw it?

4. Was the said letter delivered at your premises in any envelope or wrapper? Was it still in such envelope or wrapper when you first saw it? If nay, who had opened such envelope or wrapper? Where is such envelope or wrapper now? How was

it addressed? What has become of it, and when did you last see it?

5 Was the said letter sent to you by hand, by rail, by post, and which, or how otherwise? Were there any other and what documents or papers with it? If yea, identify the same and state where the same now are, and what has become of each of them. From what place did the said letter come? Was there any and what postmark on it?

6 Was the said letter accompanied by any request from any and what person that you would insert it in your paper? Were you ever asked to print the said letter? If yea, state when and by whom, and, if such request was in writing, identify the document. Did you consent or refuse to print it? What reply did you make to such request, if any, and when and to whom, and whether verbally or in writing? If verbally, state what you said. If in writing, identify the document.

7 * Did you know from whom the said letter had come when you first saw it? Do you know now? If yea, state from whom and how and why you knew this. Is it the fact that you published the said letter without knowing who sent it? Did you recognise the handwriting of the said letter or of the address? If yea, state to the best of your knowledge who the writer is and whether he is or has at any and what time been a ratepayer of St. Saviour's parish.

8 Did you before you published the said letter make any and what inquiries as to whether the writer thereof was a ratepayer of St. Saviour's parish, or as to who the writer was? If yea, what was the nature and result of such inquiries, and when and how and of whom did you make them?

9 † Did you, before you published the said letter, make any

* Interrogatory 7 above is only admissible where the identity of such writer is a fact material to some issue raised in the case (*Hennessy v Wright* (No 2), 24 Q. B. D. 445, n., 36 W. R. 879, *Gibson v. Evans*, 23 Q. B. D. 384, 58 L. J. Q. B. 612; 61 L. T. 388.)

† Interrogatories 9 and 10 are admissible if the defendant has pleaded either privilege or fair comment (*Elliott v Garrett*, (1902) 1 K. B. 870, 86 L. T. 441, *Plymouth Mutual Co-operative Society, Ltd v Traders' &c. Ltd*, (1906) 1 K. B. 403, see *ante*, p. 280), not if the only issue be as to damages. (*Parnell v Walter*, 24 Q. B. D. 441, 59 L. J. Q. B. 125, 38 W. R. 270, 62 L. T. 75.)

and what inquiries or investigation as to the truth of the statements contained in it, or any and which of them? Have you ever made any such inquiries or investigation? If so, when and with what result? What steps, if any, did you take to ascertain whether the words were true?

10 † Did you at the time that you published the said letter believe that the allegations contained therein, or some and which of them, were true? If yea, what information had you at the date of its publication which induced you so to believe?

11. Was the said letter, after you received it, altered in any way before insertion in your paper? If yea, specify exactly each such alteration, and who made it

No 118

OBJECTIONS TO ANSWER INTERROGATORIES

I object to answer interrogatories 1 to 7 on the grounds that they are, and each of them is, irrelevant and immaterial to the issues to be tried in this action, and unreasonable, vexatious, prolix, oppressive, and not put *bonâ fide* for the purposes of this action

I decline to answer the remainder of the interrogatories, on the grounds that they are, and each of them is, scandalous and irrelevant, that they are oppressive and unnecessary and have been exhibited unreasonably and vexatiously, that they are not material at the present stage of this action, and do not relate to any matters in question in this action, but are an abuse of the process of the Court, and ought not to be allowed

[And see *ante*, pp 288—290]

† See note † previous page.

should be taken and inserted in the brief, as it may be necessary to call him, if any attack is made on the genuineness of the letter

Have in Court [*such and such documents*]

Give full notices to produce and to inspect and admit the correspondence and all relevant documents in the possession of either party Include in the notice to produce the draft contract (undated) the and in the notice to admit, Curtis's ledger, &c [*name the documents*] It would be well to have a copy made of all the more important documents for the use of the judge Put them in strict order of date and each on a separate page

No 120

COMMENCEMENT OF AN ADVICE ON EVIDENCE IN AN ACTION FOR FRAUDULENT MISREPRESENTATION

In this case the *onus* of proving all the issues lies on the plaintiff, but the defendant must, of course, be prepared with evidence to rebut any *prima facie* case which the plaintiff may establish

The plaintiff cannot succeed, unless he prove —

1 That the defendant, or some agent of his duly authorised in that behalf, made representations to the plaintiff as to some existing fact,

2 With the intention of thereby inducing the plaintiff to purchase the defendant's brewery and to enter into the agreement of the 12th November, 1910,

3 That such representations were false in fact

4 To the knowledge of the defendant or of his authorised agent;

5 That such representations induced the plaintiff to buy the defendant's brewery and to enter into the said agreement,

6 That the plaintiff has thereby suffered damage .

No 121

COMMENCEMENT OF AN ADVICE ON EVIDENCE IN AN ACTION OF MALICIOUS PROSECUTION

In an action for malicious prosecution it is necessary for the plaintiff to prove five things, viz —

1. That the defendant preferred criminal (or took bankruptcy) proceedings against the plaintiff before a judicial officer

VII.—ADVICE ON EVIDENCE.

No. 119.

ADVICE ON EVIDENCE IN AN ACTION BY THE ASSIGNEE OF A
DEBT.

This is an action brought by the plaintiffs as assignees of a debt against the executor of the deceased debtor. The defendant refuses to admit either the assignment or notice of the assignment. This is, I presume, only a formal traverse. But, as both facts are denied, they must both be strictly proved; otherwise the present plaintiffs cannot recover. Give the defendant notice to inspect and admit the indenture of July 15th, 1909, and our copy of the notice of assignment. Give him also notice to produce the original notice of assignment served on him on August 2nd, 1909. If the defendant refuses to admit due service of this notice, it must be proved by the person who posted it, if it went by post, or who delivered it to him personally, if it was delivered by hand. The indenture of July 15th, 1909, can be proved either by the assignor, Curtis, himself, or by anybody acquainted with his handwriting.

Then comes the main question in the action:—Did the testator at the date of his death owe Curtis 189*l.*, the amount assigned by Curtis to the plaintiffs [*&c., deal with the facts and difficulties of this part of the case*]. Curtis himself will be our best witness as to the original transaction; he will prove that the testator ordered him to do the work. He can refresh his memory by referring to the pocket-book in which he took down the testator's order. Be sure and have the original entry in Court and not a clean copy of it.

The plaintiffs' witnesses then will be: Mr. Curtis and his partner, the foreman, &c. [*name them all*]. Mr. B. must be served with a *subpœna duces tecum*, a copy of his letter to the testator, and the original reply. Who is "C. Morgan" who witnessed the testator's signature to his last letter to Curtis? He should be in attendance at the trial, and a proof of his evidence

- 2 That the defendant acted maliciously
- 3 That the defendant acted without reasonable or probable cause
- 4 That the proceedings terminated in plaintiff's favour.
- 5 That the plaintiff has suffered in person, reputation, or pocket. (See the judgment of Bowen, L J., in *Abrath v N E Rail Co*, 11 Q B D at p 455, and of Hawkins, J, in *Hicks v Faulkner*, 8 Q. B D 167, 175)

No 122.

PORTION OF AN ADVICE ON EVIDENCE IN AN ACTION OF
SEDUCTION

This is an action for damages for the alleged seduction of the plaintiff's daughter by the defendant. It is really an impudent attempt to levy blackmail on the defendant by fathering upon him some other person's child.

In an action for seduction it is necessary for the plaintiff to prove —

1. That the girl seduced was the servant of the plaintiff, *both* at the time of the seduction and at the date of the subsequent illness and birth
2. That the defendant seduced the girl
- 3 That the child born was the result of this intercourse
- 4 Loss of service, or other damage

The pleadings put all these matters in issue, and the *onus* of proving each of them lies on the plaintiff.

1. The relationship of master and servant is the gist of the action. The plaintiff must prove that his daughter was acting in some capacity as his servant at the date of the seduction (otherwise there is no *injuria*: *Davies v. Williams*, 10 Q. B. 725); and also at the time of her pregnancy and illness (otherwise there would be no *damnum*: *Hedges v. Tagg*, L R. 7 Ex. 283).

The fact that the daughter lived with her parents is not alone sufficient to constitute her their servant (*Hall v. Hollander*, 4 B. & C. 660). But "the smallest degree of service will do." (*Per Abbott, C J*, in *Manvell v. Thomson*, 2 C & P at p. 304.) And indeed where, as here, the person seduced is the plaintiff's daughter, living at her father's house, under age, but capable

of acts of service, the law holds that she owes some service to her father, and will therefore presume that such services were in fact rendered. (See *Harris v Butler*, 2 M & W at pp 542, 543; *Rex v. Chillesford*, 4 B & C. at p. 102) It is sufficient if the plaintiff shows that he had a right to demand his daughter's services (*Maunder v Venn*, Moo & M 323) It is clear from the decision in *Rust v Faux* (32 L J Q B 386), that for the purposes of this action a person can serve two masters, and it is not enough for the defendant to show that the person he seduced was employed elsewhere during the daytime, so long as it appears that she slept at home and assisted in the evening in the household work .

No 123

ADVICE ON EVIDENCE IN AN ACTION OF SLANDER

The burden lies on the plaintiff to establish that the defendant spoke the words complained of, and also to prove the special damage alleged If Messrs X and Y give in Court the evidence set out in their proofs, and are not shaken in cross-examination, the plaintiff will succeed in making out a *prima facie* case.

It will then be for the defendant, if he can, to prove one or other of the two defences which he has pleaded—privilege and truth. I do not think the occasion was privileged But even if it was, yet in this case the words complained of relate solely to matters between the plaintiff and the defendant themselves, matters which are entirely within the defendant's own knowledge. He must therefore have known, when he spoke, whether what he said was true or false. He could not have honestly believed his statement to be true, unless it was in fact true In other words, the defence of privilege merges in the justification

The main dispute at the trial must, therefore, be as to the truth of the defendant's statement Now, one portion of what he said is true, *viz* , that the plaintiff did receive the cheque And a falsehood that is partly true is always the most difficult to meet The plaintiff must go into the box he should be our first witness. He must explain to the jury all the circumstances which led him to interfere in this matter The case will be either lost or won when Sir E C has concluded his cross-examination of the plaintiff

In particular, the plaintiff must explain why [*here deal with the difficulties seriatim*] Can the plaintiff's story be corroborated by anyone? Has he any memorandum or entry by which to refresh his memory? Has the defendant made any admission or half admission which would help us?

1

*

2

3

4

Our witnesses, then, will be [*name them*]

Have in Court the usual documents [*specify them*].

Give the usual notices to produce and to inspect and admit all relevant documents in the possession of either party, and in particular give notice to the defendant to produce [*name the special document*]

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